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SENTENCING REFORM A CANADIAN APPROACH



Report Of
The Canadian
Sentencing
Commission

Canada



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Sentencing Reform: A Canadian Approach

Report of The Canadian Sentencing Commission

February 1987

Canada



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The Canadian Sentencing
Commission



La Commission
canadienne sur la
détermination de la
peine

February, 1987

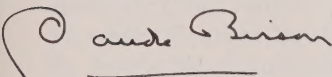
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The Governor General in Council

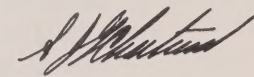
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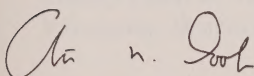
We, the Commissioners appointed under Part I of the *Inquiries Act* by Order in Council of May 10, 1984, P.C. 1984-1585, as amended on February 8, 1985; P.C. 1985-441, in accordance with the Terms of Reference assigned therein, have inquired into and beg leave to submit this report on sentencing in Canada.

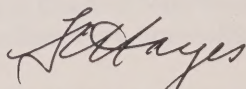
The recommendations contained in this report contemplate a comprehensive reform of sentencing laws and practices in Canada. These recommendations represent a high degree of consensus and for the most part are unanimous.

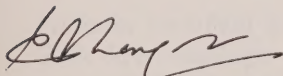
We respectfully submit our recommendations.

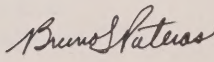

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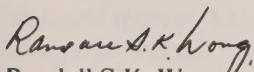

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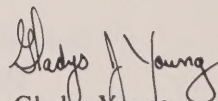

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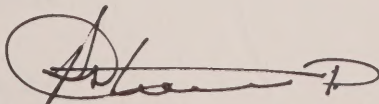

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Acknowledgements

In undertaking our mandate, we have received valuable assistance and support from provincial governments and a number of departments and agencies of the Government of Canada, most particularly, the Department of Justice, the Ministry of the Solicitor General, the Canadian Centre for Justice Statistics and the Law Reform Commission of Canada. The ongoing administrative help and advice provided to the Commission by officials of the Department of Justice assisted the efficient operation of the Commission and were greatly appreciated. In addition, we have been assisted by suggestions received from numerous individual Canadians (laypersons and professionals alike), leading scholars in the area of sentencing from other countries, professional associations and community and voluntary associations, who made submissions to the Commission or otherwise gave us the benefit of their views and advice.

On behalf of all the members of the Commission, I would like to express our gratitude to the Honourable William Robert Sinclair of Edmonton, Alberta, formerly a Justice of the Court of Appeal and Chief Justice of the Court of Queen's Bench of Alberta, who, for the first seven months, served as Chairman of the Commission. Although regrettably he was unable to continue as a member of the Commission, we were fortunate in benefitting from his expertise and experience in setting up the Commission and launching it on the right course. We thank him for his valuable contribution.

Commissions, such as ours, must rely heavily on their research staff in the realization of their mandate. Given the number of Commissioners, eight of whom were part-time, and the breadth of our mandate, it was crucial that the Commission recruit a competent and efficient research team. We were very successful in enlisting the services of research officers who served us extremely well.

Although they came from different backgrounds each one of our research officers, Renate Mohr, Karen Markham and Julian Roberts, made unique and effective contributions to the work of the Commission. The quality and volume of their work and their timely performance was beyond normal expectations. They responded cheerfully and unselfishly to our frequently urgent requests for information within next to impossible deadlines and invariably delivered a superior product. The high quality of their work made our task much easier. We were also assisted toward the end of our mandate by Gabriella Cavallero who, as research assistant, tirelessly and efficiently performed many of those tasks which make it possible to complete a report such as this one.

Special thanks go to Dr. Jean-Paul Brodeur, our esteemed Research Director. At the outset upon examining our mandate it readily became clear that the Commission would require a director of research who was not only knowledgeable but who had a vision of the range and depth of issues to be considered as well as the ability to assist the Commissioners in structuring the next two years so as to allow in-depth consideration of issues within a rigorous time-frame. Jean-Paul Brodeur, with the aid of his staff, saw to it that research was planned in advance and completed on time and organized information and background material in such a way that we were able to derive the maximum benefit from our meetings and keep our decision-making on an orderly schedule. The combination of his high degree of expertise, reliability and dedication was exceptional; it not only inspired confidence but made our work so much easier. We are indebted to l'Ecole de Criminologie of the Université de Montréal for generously acceding to the secondment of Dr. Brodeur to the Commission.

The work of the administrative personnel deserves special mention, since it is their dedication and efficiency that allowed the completion of massive amounts of work in short periods of time. Since this Commission had relatively few full-time staff persons, co-operation in all aspects of our work became essential. Madeleine de Carufel was our first administrator and laid a solid foundation for the smooth operation of the Commission. Patricia Rutt, without whom meetings with Commissioners from across the country could never have run so smoothly, served not only as our administrative officer, but took on tasks ranging from endless photocopying to proofreading the final report. Perhaps more than anyone else, Nancy Boswell and Lynn Ouellet, the permanent secretaries to the Commission, were called upon to undertake tasks above and beyond the call of duty and always succeeded in fulfilling these requests, no matter how late the hour. Their support for and assistance to the research staff and members of the Commission was invaluable. In thanking them for their generous contribution and unfailing efforts, I echo the sentiments expressed throughout the course of our mandate by all the Commissioners and members of the research staff.

In closing, let me say that the task of this Commission was both challenging and difficult. The Commissioners accept full responsibility for their recommendations. While the issues dealt with were not easy to resolve, the quality of the decision-making was in large measure attributable to Jean-Paul Brodeur and his very able staff. The realization of all this work was greatly facilitated by the good will and valuable assistance of the administrative personnel. All the members of the Commission join me in expressing to the entire staff our sincere appreciation and thanks for a job well done. I am indebted to all of them and will continue to cherish their friendship.

J.R. Omer Archambault, P.C.J.
Chairman

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Summary

1. The Context

This summary is meant to provide the reader with an overview and an understanding of the report of the Canadian Sentencing Commission. It should not be read as if it were the report itself. The recommendations are described in broad terms without mentioning details. Evidence and explanations of the Commission's findings and recommendations are only occasionally and then, very briefly, discussed. The entire report must be consulted to achieve a full understanding of the proposals.

The Canadian Sentencing Commission was given the responsibility of examining sentencing in Canada and of making recommendations on how the process should be improved. After conducting a thorough review, the Commission concluded that there are serious problems with sentencing in Canada and that these problems cannot be eliminated by tinkering with the current system or exhorting decision-makers to improve what they are doing. The system is in need of fundamental changes in its orientation and operation.

Unfortunately these are not novel assessments. The problems have existed for a very long time and in recent years have become the source of extensive discussion and debate. Yet the changes that have occurred have been piecemeal in nature while the overall context in which sentencing takes place has remained virtually unchanged for over a century. Over the course of time, various commentators, federal commissions and committees have identified many of the same problems identified by the Canadian Sentencing Commission. Problems — such as the over-reliance on custodial sanctions and the existence of unwarranted disparity in sentencing — do not require almost two and a half years of inquiry by a nine member Commission to be discovered. Identifying the problems may be relatively easy. Determining the solution is not.

The Government of Canada established the Canadian Sentencing Commission in recognition that there exist serious problems in the structure of sentencing and that these problems could only be resolved by a comprehensive set of recommendations which reflected the complexities of the criminal justice system as a whole. The members of the Commission accepted this assessment and were mindful of what had been said about sentencing over the past century.

2. An Overview of Structural Problems

The Commission found that the problems of sentencing in Canada had more to do with the structure in which sentencing decisions are made than with the people who actually make the decisions. It identified a number of serious problems including the following:

- The almost complete absence of policy from Parliament on the principles that should govern the determination of sentences.
- Maximum penalties that are unrealistically high and which do not always reflect the relative seriousness of offences.
- Mandatory minimum sentences that create injustices by unnecessarily restricting judicial discretion without accomplishing other functions ascribed to them.
- Parole and early release programs that add uncertainty and an element of indeterminacy to sentences and yet which, at the same time, fail to accomplish the goals set out for them.
- Courts of Appeal that are not structured in such a way as to make adequately comprehensive sentencing policy to provide effective guidance to trial judges. For example, Courts of Appeal, in formulating sentencing policy, can only respond on a case-by-case basis and only to those few cases brought before them. Indeed, the Courts are understandably reluctant to take on what is essentially a legislative role in setting down explicit policy on sentencing.
- A lack of systematic information about current sentencing practice. For policy-makers and sentencing judges alike easily accessible information on sentencing does not exist.

2.1 Lack of Public Confidence in Sentencing

In this context, it is not surprising that the public does not understand sentencing in Canada and yet is also critical of it. It is a system whose structure is in need of change. The public may articulate part of its concern about sentencing in terms of its belief that offenders, in particular violent offenders, are not dealt with harshly enough. However, as the Commission's public opinion surveys show, the public recognizes that the problems are more fundamental than simply a difference of opinion on the appropriate level of penalties.

Victims, too, have expressed some concerns about sentences and the sentencing process. They feel that the criminal justice system generally, is not adequately responsive to their concerns. In the specific area of sentencing, they often feel, for example, that sentences are not predictable and do not reflect the gravity of the offences. When they hear of an offender receiving a custodial sentence, they do not know what portion of that sentence will actually be served in custody. The system is not designed to encourage restitution to victims in all situations where it is appropriate. Admittedly the sentencing

process cannot, itself, address the problems of victims in the criminal justice system as a whole. However, in addressing the lack of clarity and predictability in the process and in constructing a framework to encourage the exchange of information between all those involved in and affected by the sentencing process, the recommendations of this Commission will address some of the very real concerns expressed by victims of crime.

2.2 Disparity in Sentencing

The problems with the structures in which sentencing takes place go deeper than public perceptions. There is abundant evidence of unwarranted disparity in sentences including the following:

- The majority of judges who responded to a Commission survey noted that there was variation in sentencing from judge to judge. This was perceived to be largely due to different personal attitudes and/or approaches taken by judges in sentencing offenders.
- Over 80% of almost seven hundred Crown and defence counsel from six provinces who responded to a Commission questionnaire thought that there was unwarranted variation in sentences in their own jurisdiction, and over 90% thought there was unwarranted variation across Canada.
- There is evidence that judges approach similar cases in different ways. These different approaches to cases — based on different views of what principles should be paramount — lead to different sentences being handed down for similar offences committed by similar offenders in similar circumstances.
- There is, for some offences, a fair amount of variation in the sentences handed down across jurisdictions (within and across provinces). This variation follows no discernible pattern.
- Sentencing exercises with judges who were all given the same written facts to determine a sentence suggest that judges differ widely in the sentences they would hand down. In addition, the sentences they said they would recommend tended to correspond to their view of the principles that were important in the case.

2.3 Over-Reliance on Imprisonment

Canada does not imprison as high a portion of its population as does the United States. However we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most

onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction.

2.4 The Courts of Appeal

Over the years, Parliament has provided little guidance to judges with respect to the determination of sentences. The sentencing judge must look to the Courts of Appeal for guidance on sentencing. Courts of Appeal are not, however, adequately structured to make policy on sentencing. They are not organized nationally; hence, there is no obvious way of creating a national policy. They do not have the means and resources required to gather all of the necessary information to create policy on appropriate levels of sanctions. They are structured to respond to individual cases that are brought before them rather than to create a comprehensive integrated policy for all criminal offences. Most importantly, Courts of Appeal do not represent the people of Canada as Parliament does; judges are understandably reluctant to transform their courts into legislative bodies making public policy with respect to sentencing decisions. They appear to prefer to do what they do best; to guide the interpretation of the will of Parliament in the determination of the appropriate sanction in an individual case.

3. The Need for a Comprehensive and Integrated Set of Proposals

The sentencing structure that is being proposed by this Commission involves a fundamental overhaul of sentencing in Canada. It involves recommendations having to do not only with how the judge determines a sentence, but also with important components of the criminal justice system that give meaning to the sentence imposed. Thus, the Commission has made recommendations regarding parole and remission recognizing that early release procedures are an integral part of the sentencing process and hence have a profound impact on the meaning of a sentence of imprisonment.

Since the terms of reference and the problems of sentencing are broad, the recommendations made by this Commission are necessarily broad as well. In addition, they are interrelated. Their purpose is to provide a comprehensive structure to make sentencing more equitable, predictable and understandable. This necessarily means that to understand the nature of the Commission's recommendations, one must consider them in the context of the total package. Considering almost any subset of the recommendations in isolation from the rest will distort the overall meaning of those recommendations.

4. The Need for a Canadian Solution

Solutions being proposed in other jurisdictions, though perhaps useful to examine, cannot be imported unchanged into Canada. The structure of sentencing in Canada has many positive features. Ultimately, in developing our approach to sentencing reform in Canada, we endeavoured to preserve the strengths of our sentencing system while directly attacking its weaknesses. Thus the Commission recommends that the ultimate authority for determining the appropriate sentence to impose in an individual case should remain with the trial judge. Courts of Appeal should continue to have the power and responsibility of reviewing and modifying sentences in individual cases. Parliament, as it does in other areas of national interest, should play a leading role in the formulation of criminal justice policy for the country.

5. Guiding Principles

After examining closely our system of sentencing offenders and identifying its strengths and weaknesses, the Commission was guided, in making its recommendations, by the principles found in the first column below. The second column contains a summary of the current situation.

| <i>Guiding Principles</i> | <i>Current Situation</i> |
|---|---|
| <p>Role of Parliament</p> <ul style="list-style-type: none">• The sentencing of criminal offenders should be governed, in the first instance, by principles laid down by Parliament. | <p>Parliament has thus far never stated what principles should guide sentencing.</p> |
| <p>Purpose</p> <ul style="list-style-type: none">• The fundamental purpose of sentencing is to preserve the authority of and to promote respect for the law through the imposition of just sanctions. | <p>There are at least five main purposes with no explicit system of priorities. In a given case, these purposes may conflict.</p> |
| <p>Priority</p> <ul style="list-style-type: none">• The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence. | <p>As noted above, there is no paramount principle. Judges choose among these purposes and combine them as they see fit. There are no rules determining the priority of these purposes.</p> |

Trial Judges

- Within the limits set by Parliament, the sanction imposed on an offender in Canada should ultimately be determined by an impartial and independent person with the best knowledge of the case: the trial judge.

This is the current situation. The Commission maintained this as an important principle in its recommendation.

Statutory Maximum Penalties

- The upper limit of maximum penalties should provide sufficient scope to allow the imposition of appropriate sentences. However, the range available should not be so wide as to provide no guidance.

At the moment, many maximum penalties are so high that they are rarely if ever used. Therefore, at present, the maxima provide little guidance and in many instances give a false impression of what sentence might be expected.

Restraint

- In line with the recommendations of numerous Canadian commissions that have reported in the past, sentences of imprisonment should be used more sparingly, especially for those convicted of minor property offences. Sentences of imprisonment should normally be reserved for the most serious offences, particularly those involving violence. People should not be imprisoned because of an inability to pay fines.

Canada presently imprisons more people than do most western democracies. A substantial proportion are imprisoned for minor property offences or for non-payment of fines.

Guidelines

- Within the statutory limits, judges should be given explicit guidance on the nature and length of the sanction to impose. This guidance should not preclude the judge from selecting the most appropriate sanction from the full range of sanctions prescribed by Parliament.

Parliament, directly or by implication, provides no guidance to the sentencing judge in determining the appropriate sentence to impose. Courts of Appeal give some guidance, but because the Supreme Court of Canada does not hear sentence appeals, there is no opportunity for a uniform approach across Canada.

Comprehensibility

- The sentence imposed by the court should bear a close and predictable relationship to the administration and execution of that sentence. We should move much closer then, to

The sentence pronounced in court, in many instances, varies substantially with what actually happens to an offender because of the manner in which a sentence is administered and executed.

“real time” sentencing. “Real time” sentencing reduces the discrepancy between the sentence as pronounced by the judge and as administered by correctional authorities.

Those sentenced to a term of imprisonment may be granted day release after serving one-sixth of the sentence and full release on parole after serving one-third thereof.

Equity

- The system to be proposed should, as much as possible, promote equity and enhance clarity and predictability in sentencing.

There is unwarranted disparity in sentences such that the sentence is determined by factors beyond the seriousness of the case, the blameworthiness of the offender, and the circumstances surrounding the commission of the offence. Sentences are, in most instances, not predictable unless one knows not only the facts of the case but also factors such as the identity of the trial judge and agreements that might have transpired between defence and Crown counsel. Given the uncertainty and unnecessary complexity of the system, it is not surprising that most people do not understand sentencing.

6. Definition of Sentencing

The Commission defines sentencing as the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. That definition implies that sentencing is a different concept from punishment, though obviously most sentences do involve some degree of punishment and coercion. A sentence, however, is something that must be carried out, and therefore, there must be a reasonable level of accountability in the administration of sentences. Sentences should be what they are said to be.

6.1 Purposes and Principles of Sentencing

At present, we have in Canada no clear guidance for the consistent application of principles governing the imposition of legal sanctions on offenders. There are a number of often-stated purposes — denunciation, deterrence (both general and specific), incapacitation and rehabilitation — but there is no way of determining which is most important in a particular case. Judges differ on the importance they attribute to the various purposes of sentencing in a given case. In addition, of course, these purposes are not ones which can be found in any law passed by Parliament. They are the product of judicial decisions rather than the result of democratically determined public policy.

Three of these purposes (deterrence, rehabilitation and incapacitation) are clearly pragmatic. Sentences could potentially be justified with reference to these goals to the extent that they are able to realize them. There has been a great deal of research on each of these three purposes. Although the results are too equivocal to yield certainty, the research does, nevertheless, indicate the following:

- Evidence does not support the notion that variations in sanctions (within a range that could reasonably be contemplated) affect the deterrent value of sentences. In other words, deterrence cannot be used, with empirical justification, to guide the imposition of sentences.
- There are no comprehensive data that support the idea that courts can in general, or with specific identifiable groups, impose sanctions that have a reasonable likelihood of rehabilitating offenders.
- Although it is a truism that offenders will not be able to commit the same offences while imprisoned as they would if they were at large in the community, the extensive literature on incapacitation suggests that as a crime-control strategy the costs of imprisonment far outweigh the benefits achieved in reducing crime. The difficulty with incapacitation as a crime-control strategy is simple: too many people would have to be imprisoned unnecessarily in order for crime levels to decrease appreciably.

This Commission accepts the view that sentencing cannot by itself solve major social problems such as the occurrence of crime or the plight of victims of crime. However as long as society will, pursuant to the criminal law, authorize the imposition of sanctions on offenders, the sentencing process must, first and foremost, ensure that the principles of justice and equity prevail in the exercise of the power to impose and enforce such sanctions.

7. Impact of the Proposed Changes in Structure

The Commission's recommendations deal with the structure in which sentencing decisions are made. Ultimately, of course, changes in this structure will affect what actually happens to people who have been found guilty of criminal offences. In broad terms, the Commission's recommendations would have the following impact:

- **Sentences would be more proportionate:** sentences have to be proportionate to the gravity of the offence and the responsibility of the offender. Violent offences which result in serious harm to persons would attract the longest custodial sentences. Offences against property and other less serious offences would attract lighter sanctions and to the greatest extent possible sanctions which do not involve incarceration.

- **Sentences would be more equitable:** the severity of the sanction would be determined by a more explicit set of principles, so that offenders being sentenced for similar offences committed in similar circumstances would receive similar sentences.
- **Sentences would be more understandable:** the length of a sentence of imprisonment imposed in court would be considerably closer than at present to the length of time actually spent in custody by an offender.
- **Sentences would be more predictable:** the offender, the victim and the informed public should have a better idea of what the sentence would likely be.
- **Sentences of incarceration would be used with restraint:** as a result of the development of principles to govern the determination of sentences, it is expected that frequently voiced concerns about the over-use of incarceration will be effectively addressed.

8. The Proposed Reform

8.1 An Overview of the Commission's Main Recommendations

The recommendations made by this Commission are designed to provide the sentencing judge with additional structure and guidance for the determination of sentences. They are not intended to inhibit the judge's ability to impose fair and equitable sentences which are responsive to the unique circumstances of individual cases before the court. The net effect on actual sentences would be less dramatic than might otherwise be anticipated from an examination of the individual elements of the overall policy. This is illustrated by examining the Commission's central recommendations:

- **A new rationale for sentencing;**
- **Elimination of all mandatory minimum penalties (other than for murder and high treason);**
- **Replacement of the current penalty structure for all offences other than murder and high treason with a structure of maximum penalties of 12 years, 9 years, 6 years, 3 years, 1 year or 6 months. In exceptional cases, for the most serious offences which carry a maximum sentence of either 12 or 9 years, provision is made to exceed these maxima;**
- **Elimination of full parole release (other than for sentences of life imprisonment);**
- **Provision for a reduction of time served for those inmates who display good behaviour while in prison. The portion that can be remitted would be reduced from one-third to one-quarter of the sentence imposed;**

- An increase in the use of community sanctions. The Commission recommends greater use of sanctions which do not imply incarceration (e.g. community service orders, compensation to the victim or the community and also fines, which do not involve any segregation of the offender from the community);
- Elimination of “automatic” imprisonment for fine default to reduce the likelihood that a person who cannot pay a fine will go to jail;
- Creation of a presumption for each offence respecting whether a person should normally be incarcerated or not. The judge could depart from the presumption by providing reasons for the departure;
- Creation of a “presumptive range” for each offence normally requiring incarceration (again the judge could depart by providing reasons); and
- Creation of a permanent sentencing commission to complete the development of guideline ranges for all offences, to collect and distribute information about current sentencing practice, and to review and, in appropriate cases, to modify (with the assent of the House of Commons) the presumptive sentences in light of current practice and appellate decisions.

8.2 The Purpose and Principles of Sentencing: The Commission’s Recommendation

A very important weakness of the present sentencing structure is that there is no clearly stated purpose of sentencing and there are no principles of sentencing that have been endorsed by Parliament. Instead we have a combination of sometimes unattainable and often conflicting purposes and principles.

The Commission concluded that the overall purpose of sentencing had to have two main qualities: (1) it had to be realistic, and (2) it had to emphasize the principle of justice. Thus it recommended that the fundamental purpose of sentencing should be to preserve the authority of and promote respect for the law through the imposition of just sanctions. It follows that the paramount principle determining the sentence should be that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle can be combined with a principle that has been repeated throughout legal writing in recent decades: the principle of restraint in the imposition of sanctions. The often-mentioned purpose of contributing to a just, peaceful and safe society is clearly more appropriate as a guiding purpose for the criminal law as a whole than it is as a guide to sentencing.

Since the emphasis is on the accountability of the offender rather than on punishment *per se*, a sentence should be the least onerous sanction appropriate

in the circumstances. Imprisonment should not be used for rehabilitation and should be imposed only in those cases where:

- a) it is necessary to protect the public from violent crime,
- b) another sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of the offender, or
- c) any other sanction would not adequately protect the public or the integrity of the administration of justice.

Imprisonment could be used in cases of wilful non-compliance with the terms of a sentence where no other sanction can achieve compliance.

8.3 Mandatory Minimum Sentences

Canada has a long and inconsistent history of legislated mandatory minimum sentences which have, for decades, been criticized as being ineffective and unfair by many commentators and groups interested in criminal justice. It is sometimes argued that mandatory minima indicate Parliament's view of the seriousness of an offence. However, such a view ignores one important point: some of the most serious offences — e.g. aggravated sexual assault or manslaughter — do not carry minimum terms of imprisonment. Another argument is that mandatory minima are a way of guiding the trial judge on the type of penalty that is appropriate. However, mandatory minima do not guide, they force; consequently discretion is taken out of the hands of the judge and transferred to those in the system responsible for the initiation and conduct of criminal prosecutions. For these and other reasons, then, the Commission has recommended that all mandatory minimum penalties (except for murder and high treason) be abolished.

8.4 Maximum Penalties

At present, the only guidance from Parliament on the determination of sentences for most offences is the maximum term of incarceration prescribed for each offence. These maxima have two main problems associated with them: the maxima prescribed for various offences do not correspond to the relative seriousness of those offences; and maxima do not relate to what does or should happen to someone who is convicted of an offence.

The Commission carried out a thorough review of maxima. In doing so, it looked both at current practice and the manner in which current practice would be “translated” into the Commission's overall proposals for policy. This involved creating equivalences between the effect of current parole and remission practice and the Commission's proposal that inmates serve a minimum of 75% of their sentence before being released. The Commission recommends that the ceiling for any offence (other than murder and high treason) be twelve years. A twelve year sentence under the Commission's

proposals is not only more definite than a twelve year sentence under the current system but it also would normally be a more severe sentence. Indeed almost all current sentences would, when “translated” into their equivalent sentence under the Commission’s proposals, come within the twelve year limit.

After setting the ceiling at twelve years, the Commission had the responsibility of recommending maximum penalties for the over 300 offences in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV). The final recommendations were influenced by the findings of public opinion research, rankings by other Commissions, maximum penalties presently assigned in this country and other countries, and patterns of sentences actually handed down. In general, the Commission, in line with public concerns about penalties, assigned the most severe maximum penalties to violent offences which result in serious harm to persons. The Commission recommended that the maximum penalty of 12 years be assigned to such offences as manslaughter, aggravated sexual assault and kidnapping. A nine year maximum was assigned to robbery, extortion, and sexual assault with a weapon. The lowest maximum penalty (six months in prison) was assigned to such offences as theft under \$1000, indecent acts, and gaming and betting.

8.5 Enhanced Sentences

The Commission attempted to set maxima to reflect realistic limits on what should be expected. In doing so, however, it acknowledged that there are rare circumstances where extraordinarily long sentences are appropriate. Currently we have in Canada legislation allowing for an indeterminate sentence for “dangerous offenders”. The Commission recommends that this legislation be repealed and replaced with a proposal to increase the maximum (definite) sentence under special circumstances. The major criteria governing its imposition would be (a) the offence must carry a maximum penalty of 12 or 9 years, (b) the offence must be a serious personal injury offence, and (c) it must be a brutal instance of such an offence that compels the conclusion that the offender is a threat or it must be part of a series of similar repetitive incidents. Various procedural safeguards are proposed to limit the use of this “exceptional sentence” provision. If the relevant criteria are proved by the Crown, the maximum penalty available for the offence may be increased by up to fifty percent.

8.6 Total Sentences

Many offenders before the court are sentenced for convictions arising from multiple charges. Criteria for concurrent and consecutive sentences are especially confusing since the Court must also take into account the principle that the “total sentence” must be reasonable. The Commission took the view that it is the resulting total sentence which is important rather than the means used to arrive at it. Under the Commission’s proposals, individual sentences would be assigned for each offence of conviction and then the sentencing judge

would apply the totality principle to impose a total sentence. It would no longer be necessary to make sentences consecutive and/or concurrent in order to impose the appropriate total sentence. In most cases, the judge would have, as an outer limit for the total sentence, the maximum provided for the most serious offence plus one-third of that maximum.

8.7 Parole

The Commission concluded that if the sentence pronounced in court is to be made more predictable, fair, and understandable, the rules and practices surrounding the administration of the sentence cannot continue to work at cross-purposes with sentencing principles. Thus, the Commission examined carefully the process by which a sentence of imprisonment is administered and the various programs which have the effect of varying the amount of time a person actually serves in prison.

After a person is sentenced to a term of imprisonment under the present system he or she comes under the authority of correctional services and, for purposes of release, the parole board. Although there are a number of reasons why a person might have received a sentence of imprisonment by the judge (e.g. incapacitation, deterrence, rehabilitation, denunciation), release decisions are made largely on the basis of two criteria: the perceived need for incapacitating the offender for protection reasons and an assessment of the offender's progress towards rehabilitation.

Given that the severity of the sanction imposed on an offender under the Commission's proposals is to be proportionate to the gravity of the offence and the degree of responsibility of the offender, it would be inconsistent to effectively alter the sentence for different reasons. As well, there are other considerations that make the existence of discretionary early release (parole) problematic.

8.7.1 Uncertainty

In the first place, parole release adds a great deal of uncertainty to the sentencing system. A person sentenced to a term of six years in a penitentiary could be released on day parole after one year, or on full parole after two years, or might be refused parole and would be eligible for release (because of earned remission) on mandatory supervision after four years. Assuming good behaviour in the institution, then, one inmate sentenced to six years could spend up to four times the amount of time in custody that another inmate also sentenced to six years could spend. If the original six year sentences were both set in proportion to the offence, violation of the principle of proportionality and inequity result if one offender spends up to four times as long in prison as another offender, when the same sentences were initially imposed.

Although the case law is somewhat unclear as to what role the possibility of early release should play in determining the length of a prison sentence, the majority of trial judges report that they sometimes take into account the possibility of parole being granted when they determine a sentence. Given the fact that judges do not know how the parole board might, in years to come, decide on a parole application, this kind of second guessing can only add uncertainty and inequity to an already uncertain and sometimes inequitable system.

8.7.2 Equalization

Second, there is evidence that for certain offences, the effect of full parole release is to equalize sentences; those sentenced to long terms of imprisonment tend to serve a smaller portion of their sentence in custody than do those originally given shorter sentences. Although under the current law such effects might be permissible, they make no sense in a system based on the principle that the sanction should be proportionate to the gravity of the offence and the responsibility of the offender.

8.7.3 Lack of Purpose

Probably the most powerful argument against parole is that it serves none of its stated purposes in the current system nor would it serve any rational purpose in the context of the Commission's proposals. It is essentially a structure based on a rehabilitation model. If sentencing were based primarily on rehabilitation and if offenders were rehabilitated in prison, and if we could determine with a high degree of certainty that a person had been rehabilitated, parole would make sense. Neither the present system nor the Commission's proposals have these characteristics. The Commission has, therefore, recommended that full parole be abolished.

8.7.4 Integrated Recommendations

Although offenders would generally serve a longer proportion of their sentence in custody, the recommendation to eliminate parole does not necessarily imply that there would be an overall increase in the length of time that offenders will serve in custody. As has already been noted, it is important to consider the Commission's integrated set of recommendations in order to understand the full impact of changes. The elimination of parole (and the reduction of the proportion of the sentence that can be remitted) *must* be accompanied by a reduction of the length of custodial sentences that are imposed in order to achieve the same overall average result. If the length of custodial sentences remains the same, the resulting growth of the prison population may prove to be unmanageable for the correctional authorities.

8.8 Earned Remission

The earning of some time off the original sentence for good behaviour in the institution does not present the same difficulties inherent in a system of full

parole release. Various purposes can be served by allowing a portion of a sentence to be remitted. Among the purposes served are that it allows a form of relatively non-coercive administrative control, it provides an incentive for inmates to behave appropriately, and it may provide an incentive for inmates to engage in productive training. There is no need, however, for the amount that is to be remitted to be large. Since the Commission's proposals are based, in part, on the idea that we should move closer to "real time" sentencing, the Commission recommends that this portion be relatively small. Specifically, it recommends that an inmate be able to earn (for behaving acceptably) one day for each three days of good behaviour. At present the inmate can earn one day for every two days served.

8.8.1 Withholding Release

In rare circumstances where the inmate has been convicted of one of a list of serious violent offences which caused death or serious harm and where the Sentence Administration Board (the body created to, among other things, monitor conditions of release on remission) is satisfied that the inmate is likely to commit, prior to the warrant expiry date, an offence causing death or serious bodily harm, the Board would have the power, as the National Parole Board has at present, to withhold release on remission.

8.8.2 The Issue of Supervision

At present, federal inmates released on remission are released on "mandatory supervision". The term is misleading since although the conditions of release are mandatory, the inmate cannot realistically be considered to be supervised. Resources are not and cannot be made available to supervise adequately all offenders released on remission. The Commission recommends, therefore, that all offenders be released without conditions unless the Sentence Administration Board (on the recommendation of the trial judge or on its own initiative) feels that conditions are required. Assistance, on a voluntary basis, should be provided to all inmates.

8.9 Open Custody

Given that the Commission's recommendations with regard to sentences of imprisonment are designed to create a closer correspondence between the sentence that is handed down by the judge and what actually happens to the offender, it follows that judges should be given additional power and responsibility to determine, within certain parameters, the nature of the facility where the offender should serve his sentence. At the moment, there are a number of correctional facilities that could be considered to be forms of "open custody". By letting the judge determine the type of custody as part of the sentence, the expectations of the offender and members of the public will be more likely to match the reality of what happens.

8.10 Guidelines

The Commission has recommended that the full range of sanctions — from community sanctions to the maximum term of imprisonment associated with a given offence — be available for consideration by the judge in determining the appropriate sentence for each offence. Another element that is necessary to provide adequate guidance to the judge is a rationale for sentencing. These are the only parts of the overall package of guidance to the judge which are mandatory: the judge must sentence the offender within the statutory limits, and he must do so in line with the principles approved by Parliament.

As a method of providing guidance to judges in determining the appropriate sanction this is not sufficient. A judge should receive advice on three other points: (a) the kind of sanction that is normally appropriate for cases such as the one in question, (b) an indication of the expected quantum (for sanctions such as imprisonment or fines), and (c) a procedure for departing from the normal sanction or range in appropriate cases.

This Commission recommends that guidelines be created for each criminal offence. Although such guidelines would be presumptive, the judge could give a sentence outside the guidelines if it was appropriate to do so and if explicit reasons for the departure were given. It is expected that sentencing judges would find the guidelines useful and reasonable and that they would generally follow them. However it would be inappropriate for judges to always sentence within the guidelines because to do so would, in many instances, result in granting ordinary treatment to extraordinary cases.

The guidelines for the more serious and/or the most frequently committed offences would be in two parts. First, the guideline would inform the judge whether the presumptive sentence would involve a community sanction or would include a term of imprisonment. All offences have been assigned one of four presumptions: in (custody), out (community sanction), qualified in (custody unless it is a minor instance of the offence and the offender has no relevant criminal record) and qualified out (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).

Second, for those offences involving a presumption of custody, a presumptive range is provided. For practical reasons only, the Commission has not provided numerical presumptive ranges for all offences. Instead, it chose to present prototypes of numerical ranges for a sample of offences.

The guidelines also provide a non-exhaustive list of aggravating and mitigating circumstances which may be used to determine the sentence within the presumptive range (for sentences involving custody) and which also serve as grounds for departing from the guidelines.

Guidelines that have a real impact on sentencing are important not only because they are a means of achieving sentencing goals such as fairness and equity, but also because they are the only way of ensuring that some of the Commission's other proposals — the abolition of parole and the reduction of remission — can come into effect without increasing dramatically and quickly prison populations. Under the Commission's proposals, inmates would serve a considerably higher portion of their sentences in custody. Even to maintain the same level of incarceration, it is imperative that sentences change.

Many people have expressed concerns to the Commission that certain types of guidelines would restrict unduly the discretion of the judge in imposing sentences. The Commission's proposals would structure rather than eliminate discretion. They would suggest a type and/or range of sentence to the judge; they would not ultimately be compelling on the judge. Furthermore, the guidelines would not be fixed by legislation in such a way that it would be almost impossible to change them. The Commission has recommended that they be continually evaluated and updated by a permanent sentencing commission. Indeed, this commission could revise the guidelines taking into account general changes that have occurred in Canadian society or in the criminal justice system rather than on an offence-by-offence basis.

8.10.1 Courts of Appeal

The Courts of Appeal also have an important role to play with respect to the guidelines. Crown and defence would maintain their current right to appeal sentences. Courts of Appeal would also be given the power to modify, for their province, the presumptive range for sentences of imprisonment if there were substantial and compelling reasons to do so.

8.10.2 A Permanent Sentencing Commission

A permanent sentencing commission is proposed that would have the responsibility to create, evaluate, and update these guidelines. This commission, like the Canadian Sentencing Commission, would be broadly based. It would, in the development of guidelines, consult with a judicial advisory council, the membership of which would consist of a majority of trial judges. These guidelines would be tabled in Parliament and would come into force (as guidelines) unless a resolution rejecting them was adopted by the House of Commons within a specified period of time.

8.10.3 Presumptive Guidelines

The Commission chose a middle ground on guidelines. It rejected guidelines that are strictly advisory. They have been shown to be ineffective in other jurisdictions. This is not surprising, in part because if they were seen to be useful, judges would, themselves, have developed such guidelines. No legislative change is necessary for judges to create a system of advice and yet no such system exists in Canada. The Commission also rejected all forms of

mandatory sentencing systems where a sentence would be rigidly pre-determined as soon as a judge had ascertained the existence of certain characteristics of the case. Such a rigid system was seen as not allowing for adequate individualization of sentences. Similarly, the Commission rejected all forms of formally legislated guidelines. It was felt that overall sentencing policy such as the purposes and principles of sentencing must be dealt with by Parliament as formal legislation. It was also felt that Parliament should have some say in the further determination of that policy by giving the House of Commons the power to reject, by resolution, presumptive sentencing guidelines proposed by a permanent sentencing commission. Legislative presumptive guidelines, however, were rejected by the Commission for the following reasons: (a) they would be too cumbersome and difficult to change, (b) it was felt that the involvement of Parliament at this level although necessary should be minimal and more in the nature of general overview than detailed consideration and (c) in a presumptive system of guidelines, ultimate authority to determine a particular sentence should rest with the trial judge, subject only to appellate review.

8.11 Community Sanctions

As previously mentioned, the Commission recommends that all sanctions other than custody (e.g., those involving community programs or resources, or those that involve compensation to the community such as fines or compensation to the victim) be referred to as community sanctions. They should not be thought of as “alternatives” to imprisonment, but rather as appropriate sanctions in their own right. The Commission recommends greater use of community sanctions, but that this greater use be accomplished in a principled way. Through the use of guidelines, mechanisms can be put in place to minimize the likelihood that community sanctions would be used inconsistently and as add-ons to an otherwise adequate sentence.

The Commission makes general recommendations on the need to increase the use of all community sanctions. The Commission also makes detailed recommendations on the use of two community sanctions: fines and restitution. It looked at fines because they are imposed frequently. Also there is evidence of disparity in the impact of fine default on identifiable groups (e.g., native offenders and women). Furthermore, those who fail to pay fines contribute significantly to prison populations. The Commission examined restitution because it is an appropriately constructive sanction which helps to meet some of the needs of victims.

The Commission recommends that fines be imposed only in circumstances where an inquiry reveals it is appropriate to do so. There is no point in imposing a fine on someone who cannot pay. Thus the Commission recommended that before a fine is imposed, an inquiry as to the offender's ability to pay be carried out.

The Commission recommends that we abandon the almost automatic use of imprisonment for fine default. An offender could only be incarcerated for

wilful default and only after other methods of collection have been exhausted or were determined to be inappropriate by the court. Finally, if a person were to be incarcerated for wilful default, the Commission is recommending a fixed conversion table which translates dollar amounts of fines into custodial terms.

The Commission also recommends that restitution be used more frequently in order to encourage the offender to take responsibility for his acts and, of course, as a way in which victims can be compensated.

8.12 Plea Bargaining

The Commission, by its terms of reference, had to examine the relationship between guidelines and matters related to plea negotiations. With the sentence that a convicted offender received being more explicitly linked to the offence of conviction, the practice of plea bargaining becomes more crucial. Plea bargaining can undermine the equity of a sentencing system by distorting the relationship between the criminal activities which led to the conviction of the offender and the sanction that is imposed.

The Commission rejected the idea of recommending that plea bargaining should be abolished. Such a recommendation was seen as unrealistic and furthermore was seen as effectively only transferring discretion to people in less visible parts of the criminal justice system. Thus the Commission focused on mechanisms to enhance visibility and accountability in the plea bargaining process and recommends that procedures be developed by the relevant authorities to make the plea bargaining process more open (for example, by generally requiring full disclosure of a plea agreement in open court). Furthermore, the Commission recommends that guidelines be developed which direct the Crown to keep victims informed of the process and to take their views into account. It further recommends that prior to the acceptance of a plea bargain, Crown counsel should generally be required to receive and consider a statement of the facts of the offence and its impact on the victim. In the end, however, the judge would, of course, retain ultimate authority to impose the sentence independent of any agreement regarding sentence between Crown and defence counsel.

9. Conclusion

The Commission has recommended a uniquely Canadian solution to the problems that exist in sentencing in Canada. It differs in material ways from solutions suggested elsewhere. It is an integrated package that would make sentencing more equitable, understandable and predictable. If implemented, it would have a profound impact on sentencing in Canada. However, its implementation would not result in a radical change of the nature of the sentencing process itself. The Commission's proposals seek to chart a middle ground between unfettered discretion on the one hand and rigidity on the other. This can be achieved through a combination of legislation (i.e. purpose and

principles of sentencing) and more flexible means (i.e. presumptive guidelines that are not fixed in legislation although subject to the tacit approval of the House of Commons). Those parts of the proposal which would be enacted as legislation would be binding on the system; those parts that are not (e.g., guidelines) would be presumptive. It is, therefore, a set of integrated proposals which, by representing a middle ground, is susceptible to criticism from both sides. Nevertheless, the Commission views its proposals as realistic and feasible. Sentencing should change in Canada. It is too important to be left to develop in an *ad hoc* manner. The adoption of the proposals in this report would significantly improve the sentencing process in Canada.

Part I

The Issues

Chapter 1

Terms of Reference

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Chapter 1

Terms of Reference

Never before has a commission of inquiry dealt exclusively with issues related to the determination of sentences. This is not indicative of satisfaction with all aspects of the sentencing process. In fact, since the construction of the first penitentiary in Canada, there has been strong and persistent criticism of the use of incarceration.¹ Two recurrent themes in government reports dealing with the criminal justice system are that too many people are sent to prison and for longer periods than necessary.

The commencement of the Criminal Law Review process in 1981 followed extensive preliminary work by the Law Reform Commission of Canada. It was based upon the federal government's earlier recognition (in 1979) of the need for a comprehensive review of the criminal law and the development of integrated proposals for change which were consistent with a criminal justice policy. The latter emerged in 1982 with the release of *The Criminal Law in Canadian Society* (Canada, 1982; hereafter referred to as CLICS). This statement of the purpose and principles of criminal law served as a framework for the more specific work of the federal government's Criminal Law Review, a major project of which related to the issue of sentencing.

The Sentencing Project, which was launched by the Department of Justice and the Ministry of the Solicitor General in 1982, culminated in legislative proposals for reform which were embodied in the proposed Criminal Law Reform Act, 1984 (Bill C-19)². The sentencing provisions in Bill C-19 were drafted in response to the issues and concerns set out in CLICS and in various reports of the Law Reform Commission of Canada, most notably the report on *Dispositions and Sentences in the Criminal Process* (1977). Bill C-19 recognized that the goals of equity, accountability, clarity and predictability can only be achieved if the structure and basis for our sentencing laws and practices are articulated and made more visible and understandable to professionals and laypersons alike. It also acknowledged the importance of public understanding of a sentencing system which provides sanctions as severe as imprisonment and other forms of deprivation of liberty.

The sentencing proposals in Bill C-19, which constituted only one part of the Sentencing Project, consolidated and expanded existing sentencing

provisions to form a distinct and self-contained part of the *Criminal Code*. The sentencing package focused on four areas: a statement of the purpose and principles of sentencing; enumeration of rules relating to procedure and evidence at the sentencing hearing; the development of a new and expanded range of sentencing options; and modification of the provisions relating to dangerous offenders.

The other part of the Sentencing Project was concerned with the creation of a commission of inquiry. This initiative recognized that a number of important residual issues relating to sentencing and requiring more in-depth study and consideration could not be addressed through immediate legislative change. The Canadian Sentencing Commission was created by His Excellency the Governor General in Council, by Order in Council P.C. 1984-1585 of May 10, 1984.

The broad mandate of the Commission (reproduced below) reflects the position that a careful review of a number of the more complicated aspects of sentencing should complement the substantive and procedural proposals outlined in Bill C-19. Specific areas within the Commission's mandate include the issue of a revised maximum penalty structure, proposals to minimize unwarranted variation in sentencing decisions, and mechanisms to provide more complete and accessible sentencing data to the courts and other components of the criminal justice system.

The fact that the Commission was an independent commission of inquiry permitted the review of these issues in a politically non-partisan environment. Further, the membership of the Commission, which included five members of the judiciary, three criminal justice professionals³ and a member of the academic community, ensured that the issues within the Commission's mandate were examined by individuals who had extensive knowledge of and experience in the criminal justice system and sentencing in particular.

At the time the Canadian Sentencing Commission was created, it was anticipated that the provisions of Bill C-19 would become law. However, the Bill died on the order paper with the dissolution of Parliament on July 9, 1984. Many of the provisions of Bill C-19, exclusive of the sentencing package, were later incorporated into the *Criminal Law Amendment Act, 1985*⁴ (the former Bill C-18) which was proclaimed into force on December 4, 1985. The significance of the death of Bill C-19 to the Commission's interpretation of its mandate will be addressed in the comments concerning the Commission's terms of reference.

1. Terms of Reference

The preamble of the Order in Council establishing the Commission defined the context in which its terms of reference were to be interpreted. The preamble reads as follows:

WHEREAS the sentencing of offenders is an integral part of the criminal justice system;

WHEREAS fairness, certainty, effectiveness and efficiency are desirable goals of sentencing law and practices;

WHEREAS unwarranted disparity in sentences is inconsistent with the principle of equality before the law;

WHEREAS sentencing guidelines to assist in the attainment of those goals have been developed for use in other jurisdictions and merit study and consideration for use in Canada;

AND WHEREAS other aspects of the sentencing process require in-depth examination.

The specific terms of the Commission's mandate are quoted below:

- (a) to examine the question of maximum penalties in the Criminal Code and related statutes and advise on any changes the Commissioners consider desirable with respect to specific offences in light of the relative seriousness of these offences in relation to other offences carrying the same penalty, and in relation to other criminal offences;
- (b) to examine the efficacy of various possible approaches to sentencing guidelines, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context, and for their ongoing review for purposes of updating;
- (c) to investigate and develop separate sentencing guidelines for:
 - i) different categories of offences and offenders; and
 - ii) the use of non-carceral sanctions;
- (d) to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:
 - i) prosecutorial discretion, plea and charge negotiation;
 - ii) mandatory minimum sentences provided for in legislation; and
 - iii) the parole and remission provisions of the Parole Act and the Penitentiary Act, respectively, or regulations made thereunder, as may be amended from time to time; and
- (e) to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of information systems necessary for the most efficacious use and updating of the guidelines.

The Committee further advise that the Commissioners be guided, in the development of any model guidelines, by the policy and approach that such guidelines should:

- (f) reflect the fundamental principles and purposes of sentencing as set forth in any legislation that may be adopted by Parliament, and in the Statement of Purpose and Principles set out in *The Criminal Law in Canadian Society*;
- (g) be based on relevant criminal offence and offender characteristics;
- (h) indicate the appropriate sentences applicable to cases within each category of offence and each category of offender, including the circumstances under which imprisonment of an offender is proper;
- (i) if a sentencing guideline indicates a term of imprisonment, recommend a time, or range in time for such a term; and an appropriate differential between the maximum and the minimum in a range;

- (j) include a non-exhaustive list of relevant aggravating and mitigating circumstances and indicate how they will affect the normal range of sentence for given offences; and
- (k) take into consideration sentencing and release practices, and existing penal and correctional capacities.

The terms of the Commission's mandate can thus be divided into four main areas: maximum and minimum penalties; the examination of guidelines within the Canadian context; pre-sentencing issues (e.g., plea bargaining) and post-sentencing issues (e.g., conditional release from prison); and information systems.

Maximum and Minimum Penalties

Issues relating to maximum penalties include a reorganization of the penalty structure to reflect the relative seriousness of offences and the establishment of new maximum penalties corresponding therewith. The question of minimum penalties concerns the relationship which should exist between these provisions and any guidelines proposed by the Commission.

Guidelines

The question of guidelines arises from a concern about unwarranted disparity in sentencing and the search for the appropriate balance between maintaining nationally-consistent sentencing standards and providing sufficient flexibility to address the circumstances of particular cases. The overuse of incarceration has become an issue of growing importance with respect to sentencing guidelines. The development of sentencing guidelines is a sizeable undertaking since guidelines can be developed for the use of all types of sanctions.

Pre- and Post-Sentencing Issues

The Commission was concerned with pre- and post-sentencing issues to the extent to which they affected its sentencing policy and proposals. For example, a sentencing system which strives for greater clarity in the law may be undermined by plea negotiations involving fact bargaining which compromise the quality of information presented to the sentencing court. Also, post-sentencing release provisions have an obvious impact upon the amount of time an inmate actually serves in prison.

Information Systems

The question of information systems concerns both the accessibility and accuracy of current sentencing data in Canada as well as the use of data by the courts to reduce unwarranted disparities and provide feedback on current sentencing trends.

Comments

A number of comments may be made concerning these four areas of the Commission's mandate. Proposals respecting the first three issues, although interrelated, constitute discrete packages which embody particular policy goals. In contrast, the issue of information systems is not an end in itself but a means of developing (and updating) a realistic penalty structure and a system of guidelines. These systems are also necessary to assess the impact of penalty structures and guidelines upon sentencing practice.

A second comment is that because the Commission attempted to formulate a comprehensive sentencing package, it ordered its decision-making in a logical sequence. For example, the skeletal structure of a new sentencing system was determined by the reorganization of maximum penalties. Within this structure, sentencing guidelines provided further assistance for the determination of sentences in individual cases.

Recommendations respecting pre- and post-sentencing decisions were made to ensure that the exercise of discretion by various actors in the criminal justice process was consistent with the sentencing policy embodied in the Commission's proposals.

A third comment is that the Commission's mandate did not provide a definition of guidelines. Hence, the Commission was free to develop guidelines which varied in their level of detail and degree of constraint. For example, it was possible, in view of the more intrusive nature of custodial sentences, to develop detailed guidance about the use of these sanctions but to issue general guidelines about other types of dispositions.

Finally, the demise of Bill C-19 had important consequences for the work of the Commission. In its terms of reference the Commission was directed to formulate policy which would:

reflect the fundamental principles and purposes of sentencing set forth in any legislation that may be adopted by Parliament ...

As already noted, when the Commission was created it was expected that Bill C-19 would be dealt with by Parliament. The demise of the Bill required the Commission to re-assess the sentencing policy embodied therein and to develop fundamental principles of sentencing as the philosophical base for its deliberations and proposals.

2. Issues Excluded from the Inquiry

It was necessary for the Commission to restrict the scope of its inquiry at an early stage given the magnitude of the task and the two-year period initially allocated to complete its work. Issues relating to capital punishment and dispositions under the *Young Offenders Act* were not included in its mandate and were not considered. Furthermore, time constraints prompted the

Commission to limit its study to offences contained in the *Criminal Code*, the *Narcotic Control Act* and Parts III and IV of the *Food and Drugs Act* although it fully recognized that its sentencing principles could be applied to the sentencing provisions of many other federal statutes.

During the course of its deliberations the Commission received, from individuals and groups, representations respecting such important questions as the role of the victim at the sentencing hearing and the nature and quality of information presented to the court. Procedural proposals of this nature were carefully examined by the Sentencing Project and many of the recommendations which emerged during consultations with various community and professional associations conducted by that Project were incorporated into the sentencing provisions of Bill C-19. In the absence of express reference to the sentencing hearing in its mandate and with the expectation that the Minister of Justice will be revisiting this issue, the Commission excluded procedural issues *per se* from the scope of its inquiry. However, this did not preclude the Commission from generally considering the interests of victims when making proposals respecting sentencing policy and particular aspects of the sentencing process.

3. Previous Commissions in Canada and Elsewhere

The Commission's terms of reference may be highlighted in two important respects: it was the first Commission in Canada mandated to deal specifically with the determination of sentences and related issues; and second, the scope of its inquiry was extremely broad, encompassing not only the sentencing stage itself but those pre- and post-sentencing decisions, such as plea bargaining and conditional release, which affect the length and nature of sentences. The Commission's mandate also embraced an examination of custodial and non-custodial sanctions.

3.1 Previous Commissions in Canada

Most previous commissions had either a narrow or broad focus of inquiry. Examples of commissions or committees with a relatively narrow mandate are the Archambault Commission and the subsequent Fauteux and Goldenberg Committees. In contrast to the diverse areas within the Canadian Sentencing Commission's mandate, these bodies were not directed to deal with sentencing as a whole but were required to focus on one particular area (e.g., parole or remission).

The general mandate of the Royal Commission to Investigate the Penal System of Canada (1938; chaired by The Honourable Mr. Justice Joseph Archambault) was to inquire into various aspects of corrections policy. It was specifically directed to consider such issues as the classification and treatment of offenders in penitentiaries; the classification, organization and management

of penitentiaries; selected aspects of the conditional release of offenders; as well as co-operation between governmental and social agencies in the prevention of crime and in providing assistance to prisoners released from prison.

The terms of reference of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (1956; chaired by The Honourable Mr. Justice Gerald Fauteux) were:

to investigate and report upon the principles and procedures followed in the Remission Service of the Department of Justice in connection with the exercise of clemency and to recommend what changes, if any, should be made in those principles and procedures. (p. 1)

The mandate of the Standing Senate Committee on Legal and Constitutional Affairs (1974; chaired by The Honourable H. Carl Goldenberg) was initially to “examine and report upon all aspects of the parole system in Canada” and was expanded a year later to include “all manner of releases from correctional institutions prior to termination of sentence”. (p. 1)

These commissions and committees made important contributions to law reform in their respective areas of inquiry but they were not directed to make recommendations concerning numerous components of the criminal justice system.

The Canadian Committee on Corrections (1969) (chaired by The Honourable Mr. Justice Roger Ouimet) is the most notable example of a committee of inquiry with an all-encompassing mandate. Its sweeping terms of reference included the field of corrections in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner’s sentence. The work of the Ouimet Committee had a profound influence on the subsequent development of the criminal justice system. The Canadian Sentencing Commission, to a greater degree than required of the Ouimet Committee, was directed to articulate detailed proposals respecting issues within its mandate. For example, the Commission was expressly empowered to make recommendations for the modification of the current penalty structure through a re-assessment of the relative seriousness of offences. The Commission was also directed to recommend specific terms – or ranges of terms – for custodial sentences as well as to formulate a non-exhaustive list of aggravating and mitigating factors relevant to the determination of sentences. The Commission was thus required to venture beyond general policy development and into the determination of operational features of a sentencing system.

3.2 Commissions in Other Countries

The terms of reference of the Advisory Council on the Penal System (1978) in Great Britain and those of several American Sentencing Guidelines Commissions also focused on issues which were only components of the

Canadian Sentencing Commission's broad mandate. For example, the British Advisory Council was directed:

to consider the general structure and level of maximum sentences of imprisonment available to the courts; to assess how far they represent a valid guide to sentencing practice; and whether further provision needs to be made regarding the suspension of periods of imprisonment and the combination of existing forms of non-custodial penalty and disability with sentences of imprisonment; and to make recommendations. (Advisory Council on the Penal System, 1978; 3).

The main focus of the Advisory Council's work was thus to review the compatibility of current principles governing maximum penalties for major offences with current values and to produce a more rational and relevant penalty structure. This review did not entail consideration of the effect of plea bargaining and post-sentencing release on time served nor the circumstances in which non-carceral or community sanctions should be imposed. (Hereinafter the term "community sanctions" will be employed to refer to all non-carceral sanctions. For a discussion of the reasoning behind this usage, see Chapters 5 and 12).

The Minnesota Sentencing Guidelines Commission,⁵ which is one of the best-known American Sentencing Guidelines Commissions, was directed to establish sentencing guidelines which offered guidance both with respect to disposition (when to impose a custodial term in excess of one year) and duration. In the course of performing this task, the Commission was required to consider combinations of offence and offender characteristics. It was also obliged to take prior sentencing and release practices into account and to consider available correctional resources. The Commission was empowered, though not directed, to establish guidelines for community sanctions.

To summarize, the main task of the British Advisory Council was to reformulate the existing penalty structure. In contrast, the Minnesota Sentencing Guidelines Commission was primarily concerned with providing guidance for the application of sentencing laws which were already in place. The terms of reference of the Canadian Sentencing Commission required it to accomplish both tasks; that is, to formulate a new penalty structure and to give specific direction respecting the determination of sentences.

A number of consequences flowed from the fact that the Commission's mandate embraces both of these tasks. The most important implication was the need for a high degree of consistency between the proposed changes to the penalty structure and the sentencing guidelines. For example, the work of a sentencing commission directed both to review maximum penalties and develop guidelines should not produce discrepancies between the seriousness of an offence, as defined in the *Code*, and as ranked in the guidelines.⁶

4. Sources of Information and Commission Activities

The purpose of this part is to highlight the sources of information used by the Commission in its decision-making and the general nature of its activities.

A detailed account of the Commission's research and work procedures is contained in Appendix A.

In addition to its research program the Commission conducted its inquiries by five principal means, each of which will be discussed briefly.

4.1 Submissions

The Commission's mandate expressly authorized the reception of submissions and briefs from members of the public and participants and professionals working in the criminal justice system. The Commission received submissions ranging from letters of one page in length to comprehensive briefs. Submissions were received from members of the public, from national, provincial and local groups, professional associations, as well as from individual judges and Provincial Court Judges' Associations.

Some of the submissions responded to a list of questions formulated by the Commission and distributed in 1984 as part of its information package. Other briefs focussed discussion on a number of specific issues or on particular offences. Although addressing a large number of topics, the main issues discussed were: maximum penalties, the ranking of offences, minimum penalties, purposes and principles of sentencing, disparity in sentencing, sentencing guidelines, the use of community sanctions and early release issues.

The importance of the submissions was enhanced by the fact that due to resource constraints the Commission did not hold public hearings.

4.2 Meetings

The Commission met with all professional and community associations who had prepared written submissions and who had requested a meeting. The diverse perspectives of various organizations were very helpful. Over the course of its mandate, the Commission met with such groups as the Law Reform Commission of Canada, the Criminal Lawyers' Association of Ontario, the Elizabeth Fry Society of Canada, the John Howard Societies of Canada, Alberta and Ontario, the National Joint Committee of the Canadian Chiefs of Police and the Federal Correctional Services, the Church Council on Justice and Corrections and the National Association of Provincial Court Judges.

4.3 Public Information About the Commission

Prior to the development of its recommendations, the Commission responded to invitations of various groups who had expressed an interest in learning more about the Commission's mandate. The Commission was able to provide information about its mandate and activities to these various associations and to benefit from consultations with them.

4.4 Consultations

During the formulation of its sentencing proposals, the Commission conducted two types of consultations: it met with leading Canadian, American, English, and Australian sentencing experts to obtain information and advice about the most current sentencing issues in their respective jurisdictions; it also sought legal advice from Canadian experts about selected aspects of its sentencing package.

4.5 Surveys

In an effort to form as accurate a picture as possible about public understanding of and opinion about sentencing issues, the Commission conducted three different national public opinion surveys. In addition, the Commission also undertook surveys of various groups of criminal justice professionals in recognition of the importance of utilizing their views and expertise. This was to ensure that any changes which the Commission recommended were responsive to the concerns and needs of the general public and of those professionals who must continue to work within the system. These surveys canvassed such issues as parole, sentence severity, disparity in sentencing decisions, the purpose and principles of sentencing, plea bargaining, sentencing for multiple offences and community sanctions.

4.6 Research Program

The Commission's research program involved five main activities, each of which are briefly described below:

i) *Legal Research*

Legal research was undertaken on behalf of the Commission on a variety of topics relating to the Commission's mandate. For example, in the course of developing policy on guidelines, work was commissioned on the role of Appeal Courts in establishing guidelines on sentence ranges as well as on the operation of mitigating and aggravating factors in appellate sentencing decisions (Young, 1985).⁷ Plea bargaining (Verdun-Jones and Hatch, 1985) and fines (Verdun-Jones and Mitchell-Banks, 1986) were two additional areas of legal research.

ii) *Position Papers*

Another activity within the Commission's research program related to position papers. These papers were written by leading experts in fields which had already been the subject of substantial research. Two such papers commissioned were on the effectiveness of deterrence as a goal of sentencing (Cousineau, 1986) and on the role of victims in the sentencing process (Waller, 1986).

iii) *Review of the Literature*

To avoid duplication of research which had already been done, the Commission conducted literature reviews in a number of areas pertinent to its terms of reference. For example, in order to ascertain the existence of real or perceived sentencing disparity in Canada, the Commission undertook a review of the literature on this topic (Roberts, 1985).

iv) *Empirical Research*

The Commission conducted two types of empirical research. One consisted of statistical analyses of sentencing practice (undertaken with the assistance of a number of government departments (see Hann and Kopelman, 1986). The other comprised opinion surveys of key participants in the sentencing process such as judges, Crown and defence counsel and other criminal justice professionals.

v) *Media Policy on Reporting Sentencing Decisions*

Based on earlier research which established a relationship between public views of sentencing and media treatment of sentencing decisions (Doob and Roberts, 1983), part of the Commission's research focused upon the news media. Analyses of media policy upon this topic were commissioned (Rosenfeld, 1986; Tremblay, 1986). These analyses complemented Commission research examining a nation-wide sample of newspaper stories relating to sentencing (Research #4).

4.7 Commission Activities

The main forum for the Commission's deliberations consisted of regular meetings of all Commissioners held at periodic intervals of three to six weeks. These meetings lasted from two to three days. The Commission's report embodies the recommendations and policy decisions which evolved during those discussions.

Of the nine Commissioners, eight were part-time. In addition to their other professional responsibilities, they were required to attend Commission meetings as well as review materials sent to them between meetings. Most of the working papers studied by Commissioners were prepared by the full-time research staff, consisting of the Director of Research, three research analysts, part-time researchers and administrative staff. They worked under the direction of the Chairman who was the only full-time Commissioner as well as the Commission's Executive Director⁸.

In addition, the Commission contracted with a number of leading researchers and academics to conduct studies on a variety of sentencing issues.

5. Integrated Nature of the Terms of Reference

In summary, the Commission's terms of reference were quite broad; this was reflected in the comprehensive nature of its inquiries. However, the most salient feature of the Commission's mandate was not its breadth but the implication that the sentencing process should be viewed as an integrated whole where changes introduced at one point reverberate throughout the entire system. Hence, in fulfilling the terms of its mandate, the Canadian Sentencing Commission was confronted with a challenging task: the requirement to develop a comprehensive sentencing package for Canada. Recommendations in the diverse areas within the Commission's terms of reference do not merely constitute proposed changes to separate aspects of the criminal justice process. They also represent components of an integrated package which reflects a unified sentencing policy and attempts to realize, amongst others, the goals of equity, clarity and predictability.

The mandate of the Commission envisaged the re-classification of offences and the development of a new penalty structure. It further encompassed the development of methods to structure sentencing decisions to reduce unwarranted variation, and to make sentences more predictable and understandable. Both of these features were to operate within the context of a sentencing policy and of recommendations for the development of controls upon decisions which affected either the nature and quality of charges presented to the court or the time actually served in custody by inmates. The Commission interpreted its mandate as inviting changes which were extensive and far-reaching, and did so with the understanding that the value of its recommendations could only be appraised in the context of their interrelation and on the basis that they must be considered as components of an integrated package. This is not to say that the individual elements of that package are completely resistant to modification; however, it must be stressed that because the package represents a synthesis of various components, changes to one area automatically imply the requirement to modify other areas.

Various reform bodies, such as the Law Reform Commission of Canada and the Ouimet Committee, have from time to time formulated important proposals for change in selected aspects of sentencing. In formulating its recommendations, the Commission built upon these suggested reforms and integrated them into a comprehensive scheme. In doing so, it gave express recognition to the fact that the sentencing process cannot be expected to address all the deficiencies of the criminal justice system.

Given the breadth of its mandate and the relatively brief time in which to complete its research and studies, it was necessary for the Commission to address its terms of reference in varying degrees of detail. Hence, the Commission's proposals concerning the revised penalty structure were fairly exhaustive whereas the recommendations respecting sentence ranges presented models for only a select number of offences. These models, to be referred to as prototypes, provided a basis upon which future reform could be built. The

detailed aspects of guidelines for all criminal offences are properly the subject of future construction, when additional sentencing data become available and thorough impact analyses have been conducted. Furthermore, the substantive elements of most offences in the *Criminal Code* are now being reviewed by the Law Reform Commission of Canada as part of the complete revision of the *Code* which it is currently conducting. It would have been a waste of effort to develop sentence ranges for offences which might be repealed or re-formulated in the future.

Finally, since custody is currently the most severe form of punishment which can be imposed, the Commission endeavoured to be as explicit as possible in its recommendations on the use of incarceration.

Endnotes

¹ *Pires (1986)* (p.8) cites the Committee of the House of Assembly (1831) for the following:

Gaols managed as most of ours are, as Lord Brougham well remarks, seminaries at the public expense for the purpose of instructing His Majesty's subjects in vice and immorality, and for the propagation and increase of crime.

And later (p.9) he quotes comparable comments made by the Brown Commission in 1849:

The vast number of human beings annually committed to prison in every civilized country, and the reflection that there they may receive fresh lessons in vice or be led into the path of virtue...must ever render the management of penal Institutions a study of deep importance for the Statesman as well as the Philanthropist.

See Chapter 2 of the report for a list of such quotations.

² Bill C-19 received first reading on February 7, 1984.

³ Her Honour Gladys Young was appointed to the provincial court of New Brunswick on April 14, 1986. Prior to her appointment, Commissioner Young was a Crown prosecutor.

⁴ 33-34 Elizabeth II, S.C. 1985, c. 19.

⁵ Both the Pennsylvania Commission on Sentencing and the Washington Sentencing Guidelines Commission had similar mandates. The former was directed to develop presumptive sentencing guidelines which would address three issues:

- (a) Specify a range of sentences applicable to crimes of a given degree of gravity;
- (b) Specify a range of sentences of increased severity for defendants previously convicted of a felony or felonies or of a crime involving the use of a deadly weapon; and
- (c) Prescribe variations from the range of sentences applicable on account of aggravating or mitigating circumstances. (Commonwealth of Pennsylvania Commission on Sentencing, 1982; 53)

The Washington Sentencing Guidelines Commission was required to develop a system of presumptive sentencing guidelines for adult felons. The specific terms of its mandate were to:

- (a) Recommend to the legislature a series of standard sentence ranges for all felony offences and a system for increasing the severity of the sentence to reflect any prior criminal history, and;
- (b) Recommend to the legislature prosecuting standards to structure charging of offences and plea agreements. (Sentencing Guidelines Commission, 1983; 2)

⁶ It is important to note that the Minnesota Sentencing Guidelines Commission was directed to develop sentencing guidelines rather than to also re-order offences in the *Minnesota Criminal Code*. As a result, the Minnesota Commission was less concerned with discrepancies between the seriousness ranking of an offence as it appeared in the *Criminal Code* and as it was listed in the Guidelines, than it would have been had it been required to both re-order offences and to develop guidelines.

⁷ An italicised reference indicates research undertaken specifically for this Commission. All other works are presented in standard social science format. Internal research projects conducted by the Commission research staff are indicated thus: Research #6.

⁸ Mr. Justice William Robert Sinclair resigned as Chairman of the Commission on December 3, 1984 and was succeeded by the former Vice-Chairman, Judge J.R. Omer Archambault. Associate Chief Judge Edward Langdon joined the Commission on February 8, 1985 to fill the vacancy left by the appointment of Mr. Justice Claude Bisson as Vice-Chairman.

Chapter 2

Historical Overview

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Chapter 2

Historical Overview

The purpose of this chapter is to examine the past, hoping that it might yield clues to the most desirable route for the future. This is not a comprehensive study of the history of sentencing in Canada in the nature of scholarly research. The analysis focuses on the issues which have a practical significance for policy-making and only the most meaningful trends and events in penal history are reviewed.

History is to be examined from two perspectives in this chapter. First, as a train of events,¹ with emphasis put on the interaction between changes in the criminal law and the penalty structure and the transformations in the nature of punishment and of the custodial facilities. Second, as a chain of commentaries on these events,² which reflects how the officials responsible for the administration of the criminal justice process viewed the system. Characteristics specific to Canadian penal history allow distinctions to be drawn between the events and the comments upon them. As was stressed in an early report of the proceedings of the Canadian Bar Association, the history of the Canadian criminal law is an account of incremental changes:

Since 1892, the Code has been amended year after year, here and there, something added to one section, something taken from another, with many entirely new sections and even new statutes of a criminal nature added. One is reminded of an ancient edifice to which additions have been made, planned by many architects and carried out with little regard to the appearance of the completed structure. The so-called revision of 1906 was a consolidation rather than a revision. We therefore recommend that representations be made to the Minister of Justice urging upon him the necessity of a complete revision...

This extract was approvingly quoted by the *Royal Commission to Investigate the Penal System of Canada* (Canada, 1938; 167). Close to half a century later, the complete revision of the *Criminal Code* has yet to be done. Over time, the piecemeal amendments were piled one upon the other, blurring the ultimate goal of comprehensive review and leaving the impression that no substantial changes have actually occurred. It is as if the initial picture had become a mosaic, without ever changing its colours. A review of the numerous reports which have been written on various aspects of the penal system provides overwhelming support for the impression that the history of punishment in

Canada — and particularly the history of incarceration — is simply a series of perfunctory changes.

The first part of this chapter covers the early history of the criminal law in Canada in detail. This emphasis on the earlier stages of the development of the criminal law is justified by the fact that the current penalty structure was actually implemented in the latter half of the nineteenth century. Since then, the essential features of the penalty structure have remained unchanged. The second part of the chapter illustrates this point using various official reports on the penal system. Over the last century these reports have repeatedly diagnosed the same operational defects and advocated similar remedies, which have never been implemented.

1. The Development of the Penalty Structure

Seventeen hundred and ninety one (1791), the year in which the *Constitutional Act* was proclaimed and in which a British imperial decree created Upper and Lower Canada has been selected as the starting point for this analysis. Events which occurred before 1791 are beyond the scope of this chapter. Though the *Quebec Act* of 1774 allowed for the use of French civil law in French Canada it reaffirmed that criminal affairs were to be settled according to English criminal law in all British North American colonies.

For the purposes of this chapter, Canadian penal history is divided into five periods. The most significant events of each period are briefly discussed. The conclusions that are drawn in the summary highlight important features of the process which led to the development of the present penalty structure.

1.1 From 1791 to 1846: The Wane of Capital Punishment and the Establishment of Kingston Penitentiary

Capital punishment was at the centre of the penalty structure in England at the end of the eighteenth century; more than 200 offences called for the death penalty. Given that Canada had adopted English Criminal law³, capital punishment was also the primary sentence imposed in this country. The use of incarceration was then quite limited. In 1827 the total cell capacity of local jails in Upper Canada was under 300 beds.⁴

If incarceration was not frequently used, the same can be said about the death penalty. The severity of the punishment seemed so disproportionate to the seriousness of some of the offences which called for it, that the law was applied very irregularly. Juries often refused to convict and when they did, criminal justice officials resorted to an increasing array of legal techniques to mitigate the harshness of the law or to suspend its application altogether. The criminal law became a legal fiction, punishment being as uncertain as it was severe.

By the end of the eighteenth century, European penal reformers such as Beccaria had already stated the cardinal principle of deterrence: it is not the severity but rather the certainty of punishment which deters potential offenders. A penalty structure which relied on punishment so severe that it could not be applied systematically was in clear conflict with this principle. Furthermore, England was experiencing at that time a growing crime problem. It became imperative to transform the penalty structure and the British Parliament enacted several laws to reduce the number of capital offences.⁵

The transformation of the penalty structure initiated in England was continued in Canada. For instance, an Act was passed in Upper Canada, in 1833, to limit the use of capital punishment to very serious offences such as murder, treason, rape, robbery, burglary and arson.⁶ Incarceration replaced capital punishment as the corner-stone of the penalty structure. This transition gave birth to the sentencing process as we now know it. Aside from physical punishment such as whipping, the pillory or the stocks, a penalty structure which centered on capital punishment left no room, after the conviction of an offender, for the exercise of judicial discretion. The sentence is wholly predetermined and cannot be quantified: death is either inflicted or not. In contrast, a sanction such as incarceration can range from one day to life imprisonment and the imposition of a custodial sentence must be further specified by the determination of its length. Indeed, there is a whole array of new issues, such as maximum and minimum penalties, the individualization of sentences, the notion of an indeterminate custodial sentence, which are not relevant to capital punishment but which must be addressed in a penalty structure based on incarceration.

The thorniest of these issues, perhaps, relates to the influence of public opinion on penal reform. If a penalty is disproportionate to the seriousness of the offence, it will not be applied. However, reformers often make the mistake of underestimating the amount of public support which exists for even the most unreasonably severe penalties. The public's faith in the deterrent effects of harsh punishment appears unshakable. D.A. Thomas, a British authority on sentencing, gives a detailed account in *The Penal Equation* (1978) of how the proponents of a penalty structure based on imprisonment had to set the terms of incarceration disproportionately high in order to make them acceptable substitutes, in the mind of the public, for capital punishment. This flawed reform took place in England within a period of ten years, from 1824 to 1834.

The movement away from capital punishment towards incarceration was deliberate. It is doubtful, however, that legislators and penal administrators were conscious of the problems which needed to be solved in order to articulate a new penalty structure that was both principled and consistent. This lack of awareness is nowhere more obvious than in the wandering process which led to the codification of maximum custodial penalties in Canada.

1.1.1 Banishment and Transportation

Incarceration eventually replaced capital punishment as the basic criminal sanction, but it was not the initial substitute for the death penalty. Transporta-

tion was first widely-used in England as either a condition for commuting a death sentence or as a penalty imposed in its own right by the sentencing judge. Convicted offenders were transported to, rather than from, British colonies. As a criminal sanction in those colonies, transportation required some transformation.

The Canadian equivalent of transportation was banishment and a provision in the 1800 Statutes of Upper Canada stated that⁷:

Whereas so much of the said criminal law of England as relates to the transportation of certain offenders to places beyond the seas, is either inapplicable to this Province or cannot be carried into execution without great and manifest inconvenience, (the Court), instead of the sentence of transportation, shall order and adjudge that such person be banished from this Province, for and during the same number of years, or term for which he or she would be liable by law to be transported.

Banishment and transportation (the word continued to be used in legal statutes) were not widely-used sanctions in Upper and Lower Canada. According to the records of the Upper Canada Assize Courts, no more than five persons were either banished or transported between 1792 and 1802.⁸ The importance of banishment and transportation in Canadian penal history does not lie in the frequency of their use but in the fact that these sanctions provided the initial determination of the length of *custodial* sentences. In this regard, their significance cannot be overstated, for they had the effect of increasing drastically the level of maximum penalties of imprisonment.

According to D.A. Thomas, an English Act of 1717 provided the legal basis for transportation and served as a model for many later transportation statutes.⁹ This statute established the preference for the seven times table and set the duration of transportation at seven and 14 years. These numbers have to be understood in the context of eighteenth century sailing ships, when the trip to the place of transportation could take as much as a year in itself.

Sentences of banishment imposed in Canada were of the same length as sentences of transportation in England. This does not seem unreasonable, since banishment and transportation are merely different forms of exile. What is surprising is that the scale of penalties for transportation was also applied without modification to sentences of imprisonment. In 1835 the establishment of Kingston Penitentiary entrenched the practice of incarceration in the sentencing process. In 1842 *An Act for Better Proportioning the Punishment to the Offence* stated that an offender could receive a penitentiary term equal to "any term for which he might have been transported beyond Seas."¹⁰ This was even more severe than a similar measure passed in England ten years later: the English *Penal Servitude Act* of 1853 translated a sentence of seven years of transportation into a shorter sentence of four years of incarceration.¹¹ The equivalence drawn in Canada finally prevailed and the second English *Penal Servitude Act* stated that terms of imprisonment should be identical with the initial term for transportation.¹²

It should be noted that transportation did not always deprive offenders of their freedom. Once they had reached their faraway destination many became free settlers.¹³ It seems trite to point out that imprisonment, which by definition involves a complete deprivation of freedom for its duration, provides a stark contrast to transportation, which did not imply a comparable deprivation of freedom. However, it is important to bear this in mind in analysing the significant increase of punishment involved in translating sentence lengths from transportation to imprisonment. In spite of the many differences in severity between the two, the number of years set for transportation eventually was transferred directly, and cast in prison stone.

1.1.2 The Establishment of Kingston Penitentiary

Upon a recommendation made in 1831 by a Select Committee of the House of Assembly of Upper Canada, Kingston Penitentiary was opened in 1835. It was the first penitentiary in Canada and its establishment has exerted a strong influence on many aspects of Canadian penology.

The penitentiary was intended to remedy the problem prevailing in the local prisons of the Province of Upper Canada. According to the 1831 report of the Select Committee, "...Imprisonment in the common gaols of the province is inexpedient and pernicious in the extreme...".¹⁴ The Committee suggested the following solution¹⁵:

A Penitentiary, as its name imports, should be a place to lead a man to repent of his sins and amend his life, and if it has that effect, so much the better, as the cause of religion gains by it, but it is quite enough for the purposes of the public if the punishment is so terrible that the dread of a repetition of it deter him from crime, or his description of it, others. It should therefore be a place which by every means not cruel and not affecting the health of the offender shall be rendered so irksome and so terrible that during his after life he may dread nothing so much as a repetition of the punishment, and, if possible, that he should prefer death to such a contingency. This can all be done by hard labour and privations and not only without expense to the province, but possibly bringing it as revenue.

Hard labour and privations notwithstanding, it is not altogether clear how Kingston Penitentiary was to instigate such dread that a former inmate "should prefer death" to "a repetition of the punishment", *without* resorting to "means not cruel". By recommending to cure prison's illnesses by establishing a penitentiary in which the conditions would amount to a living death, the Select Committee appears to have chosen to fight a disease by spreading it. Later parts of this chapter fully document that the establishment of Kingston Penitentiary was followed by a string of inquiries into prison conditions. Criticism of incarceration became more intense with each investigating body.

From 1833, the year in which the use of capital punishment started to diminish, to 1841, the penalty structure fluctuated so much that it is difficult to get a clear picture of it. Several Acts were passed in both Upper and Lower Canada which provided, for different categories of offences, terms of

incarceration ranging from two years in jail to life imprisonment.¹⁶ The death penalty was still the punishment for the most serious offences. There does not seem to be any consistent rationale in the determination of penalties.

However, in 1841, in the wake of the unification of the Provinces of Upper and Lower Canada, Kingston Penitentiary became the penitentiary for the United Provinces. This event had important consequences for the administration of correctional institutions and resulted in significant modifications to the penalty structure. For the first time in Canadian penal history, a statute — enacted in 1841 — provided that provincial jails would be used for those serving prison terms up to a maximum of two years.¹⁷ Kingston Penitentiary was to be reserved for offenders serving a *minimum* of seven years in custody. Corresponding changes were introduced into the penalty structure. In imposing a sentence, the judge's choices were narrowed to a few basic alternatives: a maximum term of two years in a provincial prison or a minimum sentence of seven years in the penitentiary for all recidivists and for offences for which no specific penalty was provided by the law.¹⁸ Several major Acts relating to Malicious Injuries to Property, Offences Against the Person and Larceny and other offences were passed in 1841 and they followed the pattern just described.¹⁹

These provisions were amended in 1842 and the judge was no longer compelled to impose a maximum term of two years in a provincial facility or a minimum of seven years in the penitentiary.²⁰ The minimum term in the penitentiary was now reduced to three years. This amendment to the criminal law did not obliterate the fact that it was originally the nature of available custodial facilities which dictated the penalty structure, and not the other way around.

1.2 From 1847 to 1867: Centralization and Decentralization

This period, which ends with Confederation and the proclamation of the *British North America Act* (now referred to as the *Constitution Act*, 1867)²¹, witnessed two important developments which were both embodied in this Act. The first of these was the granting of the power to legislate in the field of criminal law to the federal government. The second was the attempt to give the provinces jurisdiction over the administration of corrections. Neither of these developments was wholly successful.

1.2.1 The Power to Make Criminal Law

It was decided that the power to enact criminal law rests exclusively with the federal government. Two quotations from a speech made in 1865 to Parliament by Sir John A. Macdonald (then Attorney-General) provide the general context in which this decision was taken:²²

The criminal law too — the determination of what is a crime and what is not and how crime shall be punished — is left to the General Government. This is

a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces — that what is a crime in one part of British America, should be a crime in every part — that there should be the same protection of life and property in one as in another.

Sir John A. Macdonald stressed the need for having one criminal law throughout the land by contrasting his proposal with the weakness of the system adopted in the United States:²³

It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own, — that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

However, if we define “crime” as behaviour which is harmful enough to be *punishable by law*, it follows that the federal authority over the enactment of criminal statutes is not really exclusive. Indeed Section 92(15) of the *B.N.A. Act* granted the provinces the power to impose “*punishment by fine penalty or imprisonment for enforcing any law of the province...*”. Such was the source of the relatively artificial distinction between federal criminal law and provincial penal statutes (not to mention municipal by-laws carrying a penalty). Such also was the inception of the practice of using incarceration for reasons other than the commission of a crime. This practice is now appearing as a major problem.²⁴

1.2.2 The Authority to Administer Correctional Institutions

It is obvious that when Canadians established Kingston Penitentiary, they were not nearly as critical of the experience of their neighbours to the south as they had been in dividing jurisdictional authority between the central and provincial governments. In the United States, there existed at that time two competing models for correctional institutions: the Auburn Congregate system implemented in New York penitentiaries and the Philadelphia Separate system, which was in force in the Cherry Hill penitentiary in Pennsylvania. Both systems required the inmates to be silent. Under the Congregate system, inmates worked together during daytime and were isolated in their cells during the night; the Separate system implied continuous solitary confinement.

Kingston Penitentiary was initially modelled on the Auburn penitentiary system. However, in 1848, 13 years after it opened, Kingston Penitentiary was the object of a Royal Inquiry. The Brown Commission was appointed to investigate a situation which was the same as that which prevailed in provincial jails before the establishment of the Penitentiary. Like the local prisons it was

supposed to replace, Kingston Penitentiary had become a breeding ground for hardened criminals.²⁵

The Brown Commission of 1848 initiated a penal trend which could be called the hybridization of corrections. The Brown Commission recommended that a blend of two competing models, the congregate and separate systems of incarceration take place within Kingston Penitentiary. The Commission neglected to examine whether it was feasible to supplement the existing system with components borrowed from a rival structure (50 cells were to be added to Kingston Penitentiary for purposes of solitary confinement, as conceived in the Separate system). The tendency to patch up flaws by piling upon them a miscellany of conflicting remedies was to grow within the penal system, in the face of increasing difficulties.

The 1867 Constitution entrenched (in the highest law of the country) the hybrid character of Canadian corrections. In accordance with the general spirit of the Confederation, the *Quebec Resolutions* of 1864 had devolved to the provinces the administrative authority for “the establishment, maintenance and management of *penitentiaries*, and of public and reformatory prisons” (our emphasis).²⁶ Although this resolution had been approved by the 1866 London Conference, the authority over the administration of correctional institutions for no apparent reason was ultimately divided between the federal government and the provinces.²⁷ The two year threshold for dividing provincial and federal custody is not specified in the Constitution and several proposals have been made to change it. In 1887, an Interprovincial Conference recommended that a six month threshold be substituted for the two year threshold.²⁸ The Archambault and Fauteux Commissions also recommended modifications²⁹; so did the Ouimet Committee and the Law Reform Commission of Canada³⁰.

In the end, both the criminal legislative power and the administrative authority over correctional institutions remained divided between the central and the local governments, in spite of the will to allocate the former to the federal government and the latter to the provinces.

1.3 From 1868 to 1891: Consolidation

Sir John A. Macdonald believed that the advantage of vesting the authority to make criminal law in the central government was not only that the entire country would be ruled by the same criminal law but also that this law could be based on the criminal law of England. Lord Carnarvon, the British Colonial Secretary, praised this arrangement in the House of Lords and expressed his hope that “before very long the criminal law of the four Provinces may be assimilated — and assimilated... on the basis of English procedure.”³¹ This assimilation actually did happen with the *Consolidation Acts* of 1869, which was based on English criminal law. Before discussing the acts it is necessary to review briefly the English Consolidation of 1861.

1.3.1 The English Consolidation of 1861

At the beginning of the nineteenth century, the English criminal law was a disorganized collection of statutes. The English Criminal Law Commissioners were appointed by Lord Brougham in 1833 to introduce order and consistency into the legal confusion. Indeed, as it was acknowledged by the Commissioners in their Second Report, “it is the very essence of a law that its penalties should be definite and known; how else are they to operate on the fears of offenders, or to afford a practical guide of conduct?”³² The work of the English Criminal Commissioners has been described by Sir Rupert Cross as the “largest and most abortive codification enterprise” undertaken in England.³³ Two bodies of Commissioners were successively appointed. They laboured for more than 20 years and produced at least 11 reports, none of which resulted in legislation.³⁴

The Commissioners’ reports did not have any immediate effects, but they were used for drafting the English Consolidation of 1861. An English Home Office Report of 1979 stressed the ambiguity of the influence of the Criminal Law Commissioners on the 1861 legislation:³⁵

While the consolidation owed much to the work of the Criminal Commissioners, the Acts do not in any way reflect the views of the Commissioners, either on the penalty structure or on the scope of judicial discretion in sentencing.

The authors of this report took a very critical view of the Consolidation of 1861, stating that “despite the many and vigorous criticisms by the Criminal Law Commissioners of the *disorderly nature of the penalty structure of the early 19th century, no significant rationalization was achieved*. Improvements were limited to minor amendments...” (p. 23, emphasis added). Charles Greaves, the draftsman of the English consolidation, recognized the same shortcomings and acknowledged these in the preface to his book on the new Consolidation Acts, where he wrote:³⁶

I have long wished that all punishments for offences should be considered and placed on a satisfactory footing with reference to each other, and I had at one time hoped that might have been done in these Acts. It was however impracticable...The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establish any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences.

In view of these critical assessments, it seems clear that the British legal reformers only succeeded in consolidating past deficiencies in the penalty structure.

1.3.2 The Canadian Consolidation of 1869

The Canadian penalty structure before Confederation needed to be reordered at least as much as the English criminal statutes of the early nineteenth century. It was inconsistent, harsh and allowed for the exercise of much judicial discretion. In a study undertaken for the Canadian Sentencing

Commission, Professor Friedland provides many illustrations of this. For example: having carnal knowledge of a girl under 10 years of age was punishable by death; however, if the girl were over 10, then the punishment was entirely at the discretion of the court.³⁷

It is unfortunate that the Canadian legal reformers who undertook the consolidation of the criminal law were not as critical of the English consolidation as was Greaves. What was deemed a failed attempt at rationalization in England was believed to be nothing less than science in the Dominion of Canada. When he presented the Canadian Consolidation Acts in the House in 1869, Prime Minister Macdonald had these words to say about the English criminal law:³⁸

At present, the English system of criminal law, as a matter of science, was...as complete as it could be. The principle of the (Canadian) Bills...was identical with that of the English law, a little altered in order to suit a new country and new institutions.

In fact, the Canadian Consolidation Acts of 1869 were to a very significant extent exact copies of the English Consolidation Acts of 1861³⁹ and, consequently, they embodied all their defects. This assimilation of English criminal law was quite deliberate and was seen by the Prime Minister as an immeasurable advance, as he stated before the House:⁴⁰

...the language was as nearly as possible the language of the criminal laws of England...because it was of the greatest importance — ... — that the body of the Criminal Law should be such that the Judges in the Superior Courts should have an opportunity of adjudicating upon it, as on English law. It would be an incalculable advantage that every decision of the Imperial Courts at Westminster should be law in the Dominion. On every principle of convenience and conformity of decision with that of England, he thought it well to retain the English phraseology.

The importance of the Consolidation Acts of 1869 can scarcely be exaggerated. They provided the main articulations of the penalty structure, including: arbitrariness of design; heavy penalties; wide judicial discretion; few minimum sentences and prison terms based on the number seven. The *Stephen Code* of 1892 did not alter these basic features, which were the result of a failed criminal reform in the English homeland.

The 1869 consolidation did not follow every provision of the English criminal law. In fact, the minimum penitentiary term was reduced from three to two years, thus bridging the one year gap between prison and penitentiary, which had been introduced in 1842, in conformity with English law. The maximum prison term at that time was two years, while the minimum penitentiary term was three years, and, therefore, sentences could not range between 24 and 36 months of jail, because there was no institution where such a term could be legally served.

1.3.3 The Introduction of Remission

One of the explanations given for the sudden transfer of penitentiaries to federal jurisdiction, contrary to the original intent of the framers of the Constitution, was that it would promote uniformity of discipline. Lord Carnarvon, the British Colonial Secretary, had been the chairman of a Select Commission of the House of Lords on the state of discipline in Gaols and Houses of Correction. This committee had recommended that prison discipline be even more severe than it already was and that the Philadelphia system of complete isolation be rigorously enforced. Lord Carnarvon may have insisted that the federal government have authority over penitentiaries in order to ensure that Canadian institutions enjoyed the same conditions that prevailed in English jails.

Despite the trend towards repression and special deterrence which was to affect all British colonies,⁴¹ remission of sentences for good behaviour was introduced in Canada by the *Penitentiary Act of 1868* (section 62). Though the Act stated that remission was not to exceed five days for every month — approximately one sixth of a custodial sentence — the use of rewards instead of punishment to ensure prison discipline was a marked departure from orthodox correctional practices in Canada. The 1848 Brown Commission had explicitly advocated in its second report that prison discipline be reinforced by punishing rule-breakers rather than by rewarding the inmates who obeyed regulations.⁴²

This (granting rewards for obedience) would open a wide door to favouritism ... If he (an inmate) breaks the Prison rules, he should also have the quantum of punishment to which he becomes subject.

Like almost everything else so far, the concept of remission was borrowed from a foreign system. This time, it was the Irish Crofton system of remission, named after an earlier head of the Irish Prison system, which was to make its contribution to the growing hybridization of Canadian corrections. The draftsman of the *Penitentiary Act* of 1868 explicitly acknowledges his debt to the Irish Prison system in a letter to the Director of Irish Convict Prisons:⁴³

In my capacity as Chairman of the Board of Inspectors of Asylums and Prisons of Canada, I have been requested to prepare a rough draft of the proposed measure (remission), and in doing so I am anxious to introduce into the Dominion the principles found to work so well in the Irish Convict Prisons, so far as they may be applicable to the circumstances of this country.

The Canadian penal system was now stratified with at least four layers of diverging penal philosophies: the Auburn Congregate system, the Philadelphia Separate system, English disciplinarian movement and Irish principles of reward.

1.4 1892: The Canadian *Criminal Code*

Some historians of the Canadian criminal law date the birth of the criminal law back to 1892, when the *Criminal Code* was enacted. But it could

be argued that the *Code* merely gave form rather than substance to the pre-existing criminal law. It's a well-established fact that James Fitzjames Stephen's *Draft Code* of 1879 provided a pattern for the *Code* of 1892. Stephen's draft was transformed, with slight modifications, into the British *Commissioners' Draft Code* of 1879, which in turn provided the base for the English *Draft Code* of 1881. Although this last code was never enacted in England, its influence on the drafting of the Canadian *Criminal Code* was extensive.

It must, however, be stressed that all three above-mentioned British codifications derive from a common source: the English Consolidation of 1861. Since the Canadian *Consolidation Acts* of 1869 were themselves a carbon copy of the 1861 English criminal legislation, it follows that the penalty structure derived from Stephen's *Draft Code* was already embodied in the Canadian criminal law. The penalty scale of six months, two, five, seven, ten and fourteen years of incarceration, of life imprisonment and of capital punishment, which allegedly passed from Stephen's draft into the Canadian *Criminal Code*, had already, in fact, been in use since the *Consolidation Acts* of 1869.

In addition to the introduction of a more systematic penalty structure — which was the basic aim of codification — the only true innovation of the 1892 *Code* was the replacement of the normative difference between felonies and misdemeanours by a procedural distinction between indictable and non-indictable offences. Some offences offered the prosecutor a choice between proceeding by way of indictment or by way of summary conviction; these are referred to as “hybrid” offences. There were also relics from former times in the 1892 *Code*. For instance, a provision that was first enacted in 1841 which stated that a seven year penalty applied to all offences for which no particular penalty had been provided, was incorporated into the *Code*.

Though the *Criminal Code* of 1892 was more of a last step in the process which began in 1869 than a fresh start, certain features of this legislation require further discussion.

1.4.1 The Rationale Underlying the Code

In assigning onerous penalties to a large number of offences, the *Code* of 1892 embodied a rationale of retribution and deterrence. James Fitzjames Stephen, who provided the initial draft for the *Code*, had been consistent in advocating vengeance as the cornerstone of criminal justice. As early as 1874, he had written that “vengeance affects and ought to affect the amount of punishment”.⁴⁴ He was to revisit the issue in his monumental *History of the Criminal Law of England* (1883), where he wrote:⁴⁵

The criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite.

Stephen then developed the argument that the criminal law actually regulates the passion of revenge, thus providing legitimacy for its exercise.

This emphasis on revenge and retribution was not foreign to Canadian penal tradition; it was in fact particularly consistent with the principles which were applied in Kingston Penitentiary. Principles of reformation through penance were, in theory, also applied in Kingston Penitentiary. However, the principles of retribution and deterrence were originally given priority, as can be inferred from later criticism of the penitentiary.

1.4.2 The Logic of the *Code*

In the course of the parliamentary debates which surrounded the passing of the *Code*, Sir John Thompson, the Canadian Minister of Justice, declared in the House of Commons:⁴⁶

We have to provide maximum punishment for the gravest kind of ... offence, leaving it to the discretion of the court to mitigate the punishment according to circumstances.

The above-quoted argument has been stated so often that little attention is paid to either its meaning or its implications. It must be noticed that Sir John Thompson gives an interpretation of the nature of the law which is open to question. According to its rightful meaning, the law provides the norm or the standard which is to be applied in most instances. By contrast, special circumstances, such as mitigating or aggravating factors, are associated with deviations from the norm or standard. The argument put forth by Sir John Thompson, however, turns this logic around. It claims that the legal standard should be set in order to accommodate the exceptions — the gravest kinds of offences — and that mitigating circumstances should generally be applied in the normal cases. When it is embodied in legislation, this line of thought generates a wide discrepancy between the very high maximum penalties, which are almost never imposed, and *current* practice which appears to deviate systematically from the legal standard, as it is actually formulated.

This view of sentencing is neither obvious nor compelling. One can easily think of alternatives, such as setting the legal standard closer to the average case and providing ways of going beyond that standard in cases of exceptional gravity.

1.4.3 Individual Offences

The penalty structure consolidated by the *Code* of 1892 was amended slightly in the course of parliamentary debate. Hansard supplies the following account of an exchange between a member of Parliament and the Minister of Justice, which took place on May 25, 1892. The object of the discussion was the penalty for having had sexual relations with a mentally-retarded person:⁴⁷

Mr. Flint: I do not think the punishment in this case is severe enough.

Sir John Thompson: Make it four years, then.

Appearances notwithstanding, what this exchange and its conclusion illustrates is *not* the arbitrariness of parliamentary decisions regarding criminal

penalties, but rather, it is a strong reminder of the important point made by Charles Greaves, the draftsman of the very influential English Consolidation Acts of 1861. Charles Greaves rightly argued that the punishment for a particular offence cannot be determined by examining the offence independently of the whole structure of penalties for other offences. There is no natural connection between an offence and a particular number of years in jail. Hence, when a sentence is taken out of a penalty structure, there is nothing to impede doubling or halving it. Determining a particular punishment should always be an exercise involving comparison of the seriousness of the offence to other offences.

1.4.4 The Right to Appeal

The right to appeal a conviction⁴⁸ was introduced by the *Code* of 1892. However, the right to appeal *sentences* was limited at first to cases where the sentence was one “which could not by law be passed.”⁴⁹ Only in 1921 were Courts of Appeal given the power to review the fitness as opposed to just the legality of the sentence imposed.⁵⁰ Penal history suggests that Parliament has been reluctant to grant the Courts of Appeal sweeping powers with regard to the sentencing process.

1.5 From 1893 to Present Day: Sentencing Practice and Sentencing Theory

This report does not attempt to present as detailed an account of the events that followed the enactment of the *Criminal Code*, as the chronicle of the events preceding the year 1892. The purpose of this historical development was to discuss the events which led to the establishment of the present penalty structure. Although the history of the Canadian criminal law did not end in 1892, no legislative enactments in this area since that time were designed to alter its basic structure, with perhaps two notable exceptions. First, the creation of full parole in 1958 and the ensuing measures taken in the field of early release from custody such as release on mandatory supervision. Second, the abolition of capital punishment in 1976.

The reader should be reminded here that while the Commission has decided to address all issues connected with incarceration, it did not deal with the death penalty itself as it was not considered to be included in its mandate. In this context, it can be said that the replacement of capital punishment by a mandatory sentence of life imprisonment (without eligibility for parole until 25 years of the sentence has been served) illustrates the tendency to compensate for the abolition of the death penalty by increasing the severity of the substitute sanction, apparently without a full assessment of the consequences of this increase.

It should not be inferred from these preliminary remarks that no more can be said about the evolution of criminal law from 1892 to 1986. In fact a number of significant points will now be discussed.

1.5.1 The Growing Complexity of the Criminal Law

To a large extent, two basic factors account for the great increase in the complexity of the criminal law. The first of these is the fluctuation over time of the maximum penalties. Dandurand (1982) has painstakingly recorded the amendments made to the maximum penalties in the *Criminal Code* from 1892 to 1955. Not only are these amendments extremely numerous, but they do not appear to have been made with a view to preserving what little consistency the penalty structure initially had in 1892. The changes reflect society's changing moods concerning the seriousness of an offence over time and they were greatly influenced by external historical factors. For instance, in the 1892 *Code* the offence of sedition was punishable by a maximum of two years in jail. In 1919, two years after the Russian revolution and the spread of Communism in Europe, Parliament raised the maximum to 20 years of incarceration. It was reduced to two years again in 1930 but raised to seven years in 1951, during the Cold War. The maximum for sedition was increased once more to 14 years in the 1953-54 revision of the *Code* where it has remained ever since.⁵¹ Changes in penalties for existing offences were not the only amendments made to the *Criminal Code*. New offences have been added to the *Code*, such as the offences relating to the protection of privacy (Part IV.1 of the *Code*). New related acts such as the *Narcotic Control Act* and the *Food and Drugs Act* have expanded Canadian criminal law, while offences which are now considered obsolete (such as duelling (s.72), witchcraft (s.323), or seduction of female passengers on vessels (s.154)) have not been deleted. Thus, the proliferation of amendments to the *Criminal Code* without the deletion of outdated or redundant offences undermines the credibility of the criminal law and contributes significantly to its complexity.

The second factor which accounts for the increasing complexity of the criminal law was the introduction of new dispositions and new sanctions. Although the Report will discuss this issue in greater detail in the chapter on community sanctions, it should be mentioned at this stage that the practice of probation originated in 1921, that the suspended sentence was in use in 1927 and that the absolute discharge, the conditional discharge and the intermittent sentence were introduced in 1972. These are approximate dates and only refer to the introduction of a practice which was the object of further legal developments in later years. While the notion of probation had appeared in 1889, this measure only evolved after 1921 and took its present form in 1961.

However wide-ranging, like the introduction of probation, or relatively narrow, like the fluctuation of the maximum penalty for sedition, these changes were not intended to refurbish the penalty structure. The overall effect of these developments has been to transform the *Code* into a maze of provisions in which legal experts are found wandering and the Canadian citizen is completely lost. The complexity of the criminal law has also created a gap between the letter of the law and its current application. When a system becomes too complicated and burdensome, it generates a parallel informal process, where cases are resolved more expeditiously and with less accountability.

ity. Plea bargaining is a good example of an informal process that has evolved to circumvent some complex and time-consuming procedures.

1.5.2 The Ideal and the Practice of Rehabilitation

The end of the nineteenth century witnessed a major shift in penology. The stern ideology of retribution and deterrence, which had been predominant among officials of the criminal justice system was gradually displaced by the idea that prison ought to be used to rehabilitate offenders. Rehabilitation was to become the major trend in penology until the 1970's. It was advocated in England by the Gladstone Committee as early as 1895. In the U.S., the state of New York incorporated the goal of rehabilitation into its penal legislation in 1876. When California enacted the most comprehensive legislation on the rehabilitation of offenders in 1917, 41 states had already followed the example set by New York.

The attitudes of criminal justice officials towards rehabilitation were more ambivalent in Canada than elsewhere. Actually, the only important Canadian report that included a clear position in favour of rehabilitation was the 1969 *Report of the Canadian Committee on Corrections* (the Ouimet Report, p. 18):

The Committee sees the overall end of the criminal process as the protection of society and believes that this is best achieved by an attempt to rehabilitate offenders...

Ironically, at that time close to a century of experimentation with rehabilitation programs in other countries had produced disappointing results.

In order to understand the fate of rehabilitation in Canada, it is necessary to understand the implication of the concept of rehabilitation at its inception. Rehabilitation sprang out of nineteenth-century positivist philosophy which, according to the medical analogy, viewed delinquency as a disease requiring treatment. The cure was to be administered *inside prison*. This last point is of paramount importance; those who advocate rehabilitation in the 1980's claim that the best, if not the only way to achieve this aim is through *non-custodial programs*.

The original proponents of rehabilitation viewed a penitentiary as a sort of maximum security hospital. Normally, when a patient is admitted to a hospital, he should not be released until he is cured. However, it is very difficult to predict when the patient is going to be restored to health. Hence the length of a stay in a clinic or a hospital is indeterminate and depends on the progress of the particular individual. Similarly, prison rehabilitation required indeterminate sentences. The offender was to be released only after being cured of his criminal pathology and there was no way for the sentencing judge to know exactly when this would happen. Hence, judges were compelled to impose indeterminate sentences. In fact, all 43 American states which embraced rehabilitation also adopted indeterminate sentencing practices. In Canada, the ideal of rehabilitation was embraced, but what was believed to be the necessary means to achieve it — indeterminate sentencing — was largely rejected.

At the end of the 1930's, there was a strong reaction against the ideology of retribution and deterrence. Hence, the 1938 *Report of the Royal Commission to Investigate the Penal System of Canada* (the Archambault Report) stated unambiguously (p. 9):

[I]t is admitted by all the foremost students of penology that the revengeful or retributive character of punishment should be completely *eliminated*, and that the deterrent effect of punishment alone ... is practically valueless...

Likewise, the 1956 *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Fauteux Report) asserted, (p. 11):

While, therefore, we speak of "punishing" the offender, it is clear that in a modern correctional system there is no place for punishment which is based on nothing more than retribution.

Because of its humanitarian overtones, the notion of rehabilitation appealed to penologists who were critical of the repressive use of incarceration and it conveniently served to fill the vacuum left by the repudiation of retribution.

However, the ambiguity of feelings towards rehabilitation can be perceived even in the Archambault Report, which uses the word "reformation" more readily than the expression "rehabilitation".⁵² Actually, it was realized in Canada as early as 1915 that it was unjustifiable to incarcerate someone solely for purposes of rehabilitation. In a speech delivered to the House of Commons in that year, the Minister of Justice, C.J. Dougherty declared:⁵³

When it is suggested that a penitentiary should cease to be a place where people are punished, that the conditions in it shall be made such as it shall cease to be a punitive institution, then I think the time will have arrived when the state would have no right to maintain such an institution. We have no right, in my judgment, to imprison a man exclusively for the sake of reforming him; our right rests on the necessity of punishing him to protect society, and when the necessity for punishment will have disappeared, the right to imprison will have disappeared also.

Since there were such strong objections to the use of incarceration for the sole purpose of rehabilitating an offender, it should come as no surprise that the most specific embodiment of the rehabilitative use of custody — the indeterminate sentence — was not accepted in Canada.

Limited indeterminate sentences have been imposed since 1913 in Ontario and since 1948 in British Columbia.⁵⁴ In those two provinces, a sentencing judge could add a two years less a day indeterminate sentence to a two year less a day definite sentence, thus opening up the possibility that an offender might spend four years (less two days) in a provincial jail. The Ouimet Report recommended the abolition of all two year indeterminate sentences in Ontario and British Columbia. Its recommendation was finally implemented and made law in 1977.⁵⁵

Indeterminate sentences are still used in Canada in a very limited way. In 1947, Parliament passed the *Criminal Code Amendment Act*, which permitted the incarceration of habitual criminals for an indeterminate period of time.⁵⁶ At that time, an habitual criminal was defined as one who “has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading a persistently criminal life”.⁵⁷ When it criticized the habitual criminal legislation, the Ouimet Report noted that it was “enacted in Canada at a time when its defects were already being recognized in England”.⁵⁸ Following a recommendation of the Ouimet Report, the habitual offender legislation was abolished in 1977 and replaced by “dangerous offender” legislation, which is still in force.

In view of later criticism of indeterminate sentences, and of their failure to fulfill their rehabilitative goals, it is fortunate that Canadian sentencing did not fully embrace this practice. However, there was one unfortunate consequence. The criminal justice system adopted rehabilitation as the underlying sentencing rationale and spurned its practical implications for a sentencing policy. By so doing, the system thereby entrenched the age-old discrepancy between theory and practice.

1.6 Summary

The results of the preceding analyses will be summarized by describing the main features which have emerged from the historical development of the penalty structure in Canada.

1.6.1 Contingency

When the criminal law is examined over a relatively short time-frame such as a decade, it would appear that penal practice is both the product of deliberate criminal justice policy and is governed by the criminal law. This misperception is fostered by the fact that practice does seem, over a short period of time, to be determined by legal necessity and by reason. However, this perspective changes if the operation of the criminal law is examined over periods of time of sufficient length to expose the nature of legal change. Over these lengthy periods of time, it is practice which appears to override the criminal law. For example, the current penalty structure in Canada was greatly influenced by the establishment of Kingston Penitentiary and by the use of banishment and transportation. Reference to the two year mark to delineate sentences served in provincial prisons, as opposed to federal penitentiaries, was influenced by so many considerations that it cannot be said to reflect one particular rationale.

The upshot of these remarks is that the assertion that a particular feature of the criminal law is the outcome of historical tradition cannot be said to be an argument for its preservation, its amendment or its abolition. The historical

development which produced a specific element of the criminal law must itself be the object of independent assessment.

1.6.2 Transplantation

There is one particular tendency which can and should be avoided. It is the incorporation into Canadian legislation of that which is known to be inadequate in the country of origin (i.e. where there does not seem to be any reason to transplant legal measures, except that they happen to be available). For instance, though the draftsman of the English Consolidation of 1861 knew that it violated important principles of justice, (and he said so), it was branded state-of-the-art criminal legislation here and was copied with only minor adaptations in the Canadian Consolidation of 1869. Again, as the Ouimet Report noted, Canada passed habitual criminal legislation when this measure was under severe criticism in England. In turn, the Ouimet Committee chose to advocate rehabilitation when the results of rehabilitation programs were being questioned by an increasing number of people.

1.6.3 Stratification

Stratification refers to the gradual accumulation of sentencing principles and goals without any thorough assessment of whether they are consistent with each other. They are laid one upon another with no attempt at integration. In this manner, a layer of retribution becomes the foundation for a level of rehabilitation and these are finally transformed into loose rationalizations which are amenable to the justification of widely diverging sentencing practices. In a similar way, the Congregate system of incarceration originally implemented at Kingston Penitentiary was supplemented with elements from rival systems based upon completely different principles. The predictable outcome of stratification is the disparate character of sentencing and penal practice.

1.6.4 Recurrence

It is a striking fact that a Canadian Minister of Justice declared before the House of Commons in 1915 that imprisonment for the sole purpose of rehabilitation was unjustifiable and yet this issue only came to the fore in the late seventies. This principle was in fact enshrined in the *Statement of Purpose and Principles of Sentencing* in the Criminal Law Reform Act, 1984 (Bill C-19). However reasonable or well-supported by empirical evidence, so few things are taken for granted in penology that the same discussions are held as periodic rituals generating nothing beyond their own repetition.

1.6.5 Purposefulness

The history of the penal law cannot be reduced to a sequence of unintended events. Deliberate choices were effectively made, such as the

general rejection of the indeterminate sentence. The undercurrent in the history of Canadian criminal law is a striving for unity and explicitness. In contrast with the American model, Canadian law-makers have upheld the necessity of having the same criminal law for all citizens. Contrary to the British experience, they have also stressed the need for a codification of the criminal law. This concern for legal unity and explicitness has been expressed with varying intensity over time. This Commission believes that it was nevertheless always present and that it will always be justified.

2. The Reports on the Use of Incarceration

The introduction to this chapter asserted that a review of official reports on the criminal law and its operation in Canada provided clear evidence that Canadian penal history was more of a tribute to the resiliency of the criminal justice system than a chronicle of change. The best way to support this statement is to illustrate, through a series of quotations, the extent to which official reports repeat themselves. Going through this list of quotations may be tedious, but it is also rewarding. The systematic redundancy of these reports becomes quite clear. The following quotations are excerpts from reports written between 1831 and 1977. They all make the same basic point — that prisons are training grounds for criminals. The failure of the system of classification, which is supposed to segregate occasional offenders from hardened criminals, is generally blamed for this situation. It is important to note that any number of themes could have been chosen to illustrate the redundancy of the reports.

The “school of crime” theme has been selected among many others to provide a list of significant extracts from official reports for one specific reason. It represents one of the most fundamental criticisms that can be made of the use of imprisonment. Prisons are intended to deter offenders and to reduce the incidence of crime. At the very least, they are not supposed to foster crime. If there is one defect in the practice of incarceration which ought to have been remedied, it is this one.

2.1 Excerpts from Official Reports

1831: Committee of the House of Assembly, *Report in the Journal of the House of Assembly*.

Imprisonment in the common gaols of the province is inexpedient and pernicious in the extreme, as there is not a sufficient classification or separation of the prisoners, so that a lad who is confined for a simple assault (or crime in which, as there is but little moral turpitude, argues no depravity in the offender) or even on suspicion of crimes of that description and degree, may be kept for twelve months in company with murderers, thieves, robbers and burglars and the most depraved characters in the province, and a man must know but little of human nature indeed who can for a moment suppose that such evil communications will not corrupt good manners...Gaols managed as most of ours are, as Lord Brougham well remarks, are seminaries at the

public expense for the purpose of instructing His Majesty's subjects in vice and immorality, and for the propagation and increase of crime (Appendix, 211-212).

1849: Brown Commission, *Second Report of the Commissioners of the Penitentiary Inquiry* (Kingston).

The vast number of human beings annually committed to prison in every civilized country, and the reflection that there they may receive fresh lessons in vice or be led into the path of virtue that, after a brief space, they are to be thrown back on their old habits, more deeply versed than before in the mysteries of crime, or returned to society with new feelings, industrious habits, and good resolutions for the future — must ever render the management of penal Institutions a study of deep importance for the Statesman as well as the Philanthropist.

In Canada... We have but one penal Institution of which the aim is reformation, and the little success which has as yet attended its operations, it has been our painful duty to disclose (p. 71).

1859: *Report of the Board of Inspectors for the Year 1858.*

Let us state at once (and here we merely echo the opinion of the great majority of the officers of our prisons), that our common gaols are schools of vice, to which novices in crime repair to receive, in an atmosphere of idleness and debauchery, lessons in villainy from hardened adepts, older than themselves in crime, who become at once their models and their guides.

1914: Macdonnell Commission, *Report of the Royal Commission on Penitentiaries.*

Thus it will be seen the daily round of the penitentiary offers little to stimulate or encourage the well-disposed convict. On the contrary, its silence and solitude must breed moroseness and resentfulness. One convict said to us: "If a man is battered down until he feels that he is nothing much more above the beast, how can you expect him to go out feeling better? It requires a very strong will to keep you from feeling that you are finished." (p. 8)

1921: Biggar Committee, *Report on Penitentiary Regulations.*

Almost all the inmates of the penitentiaries must before they die be returned to freedom, and each prisoner on his release will be called upon to live the ordinary life of a free man. Society therefore must inevitably suffer, if during his term a convict's spirit has been broken, if his habit of industry, if it existed, had been suppressed, and to the extent that his morals have been corrupted by prison associations. It is also true of course, that the convict himself suffers...(p. 11).

It is no part of the purpose of imprisonment that the spirit of prisoners should be broken or that they should when they have completed their terms, as almost all of them sooner or later will be worse citizens by reason of their punishment. On the contrary, they should be better and less likely than when they entered the penitentiary...

1938: Archambault Commission, *Report of the Royal Commission to Investigate the Penal System of Canada.*

The undeniable responsibility of the state to those held in its custody is to see that they are not returned to freedom worse than when they were taken in charge. This responsibility has been officially recognized in Canada for nearly a century but, although recognized, it has not been discharged. The evidence

before this Commission convinces us that there are very few, if any, prisoners who enter our penitentiaries who do not leave them worse members of society than when they entered them. This is a severe, but in our opinion, just indictment of the present and past administrations (p. 100).

Although there have been nearly one hundred years of legislation and agitation on the subject of classification, we regret to state that throughout Canada, both in the penitentiaries and the reformatories, there is very little intelligent or effective classification of the prisoners (p. 104).

Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty. The injustice in such a law is patent. The poverty-stricken man is punished more severely for the commission of the same offence than the man with means. Your Commissioners are of the opinion that many recidivist criminals often receive their first education in crime upon being committed to prison for non-payment of fines (pp. 167-168).

- 1947: Gibson Inquiry, *Report Regarding the Penitentiary System of Canada*. (Commissioner Gibson was appointed to inquire whether the recommendations of the Archambault Report had been implemented.)

It will be seen, therefore, that substantial progress has been made in carrying out the physical changes recommended by the Royal Commission but that much remains to be done to give that greater emphasis on the reformatory training and treatment of the convicts that formed the main theme of the Commission's Report (p. 8).

- 1956: Fauteux Committee, *Report of the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada*.

If, through lack of understanding on the part of the court, or the lack of proper probation facilities, the first offender is sent to prison, the result may be to promote even greater anti-social conduct (p. 26).

- 1969: Ouimet Committee, *Report of the Canadian Committee on Corrections*.

One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. As a result, instead of reformed citizens society has been receiving from its prisons the human product of a form of anti-social organization which supports criminal behaviour (p. 314).

- 1969: Commission Prévost, *La société face au crime*.

At the very heart of our convictions about punishment is our absolute confidence that drastic penalties remain the most efficient way to bring the guilty to respect the law.

However, the vast majority of inmates in Québec prisons are recidivists. Thus, our prisons generate their own clientele. Thus, also is our correctional system a judge of itself...(translated from the French, p. 48).

1972: Swackhamer Commission, *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary During April 1971*.

The classification process is work that calls for a highly refined although largely subjective judgment about an inmate's personality and needs. Under the pressures of time and staff which existed in Kingston Penitentiary, it is inconceivable that a proper classification program could have been applied, either upon reception or later (p. 40).

1973: Le Dain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs*.

Perhaps the chief objection to imprisonment is that it tends to achieve the opposite of the result which it purports to seek. Instead of curing offenders of criminal inclinations it tends to reinforce them. This results from confining offenders together in a closed society in which a criminal subculture develops (pp. 58-59).

These adverse effects of imprisonment are particularly reflected in the treatment of drug offenders. Our investigations suggest that there is considerable circulation of drugs within penal institutions, that offenders are reinforced in their attachment to the drug culture, and that in many cases they are introduced to certain kinds of drug use by prison contacts. Thus imprisonment does not cut off all contact with drugs or the drug subculture, nor does it cut off contact with individual drug users. Actually, it increases exposure to the influence of chronic, harmful drug users (p. 59).

1974: Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions. Strict Liability*.

When a judge sentences an offender to jail to "protect the community" what does he mean? Does he mean that the jail term will reduce the likelihood of this particular offender committing another crime, or does he mean that while the offender is locked up the community will be free of his depredations, or does he mean that the sentence of imprisonment will deter others from committing similar crimes? Of these three possible meanings, only the second can be fully accepted...

The first of the three possible interpretations, above, is definitely unfounded by the evidence; if anything, it is said, jail is likely to strengthen recidivism rather than reduce it (pp. 4-5).

1977: MacGuigan Sub-Committee, *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada*.

The persistent recidivist statistic can be related to the fact that so many in prison have been irreversibly damaged by the system by the time they reach the final storehouse of the Criminal Justice System — the penitentiary...It was compounded in schools, foster homes, group homes, orphanages, the juvenile justice system, the courts, the police stations, provincial jails, and finally in the "university" of the system, the penitentiary (p. 10).

Most of those in prison are not dangerous. However, cruel lockups, isolation, the injustices and harassment deliberately inflicted on prisoners unable to fight back, make non-violent inmates violent, and those already dangerous more dangerous (p. 16).

Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes — correcting the offender and providing permanent protection to society. The recidivist rate of up to 80 percent is the evidence of both (p. 35).

1977: Solicitor General of Canada, *A Summary and Analysis of Some Major Inquiries on Corrections — 1938 to 1977*.

Growing evidence exists that, as educational centres, our prisons have been most effective in educating less experienced, less hardened offenders to be more difficult and professional criminals, (p. iv).

1983: Government of Canada, *The Report of the Inquiry into Habitual Criminals in Canada*, The Honourable Judge Stuart M. Leggatt.

There is also no question that in a number of cases the length of an offender's detention is directly related to his obstreperous and aggressive attitude towards authority and supervision (p. 9).

Reading through this list of quotes is a monotonous exercise. It was thought that making the reader experience the repetitious character of the reports on the criminal justice system would be the most efficient way to demonstrate that the same points kept recurring in these reports, without any significant change having occurred in the criminal justice system itself.

It was previously emphasized that the topic discussed in the quotations — prisons as schools for crime — was one of several issues discussed in the various reports. Some other concerns mentioned in these reports were: the over-use of custodial sanctions; the excessive length of sentences of imprisonment; the high costs of incarceration; the stigmatizing effect of a jail term and the need to resort to the least drastic alternative in sentencing.

2.2 A Provisional Conclusion: Restraint

One theme which recurs even more frequently than that discussed in the previous section of this chapter is the principle of restraint. The need for restraint can be viewed as an echo of the belief that incarceration is a breeding ground for crime. If imprisonment is realized to be, at best, a partial failure, it is only logical to recommend that it be used with extreme moderation.

The original concept of restraint was quite narrow. However, its meaning has been progressively extended by the various commissions and select committees that have discussed the need for moderation in the use of punishment.

The development of the principle of restraint can be divided into three periods. The first period started in 1849, with the publication of the Brown report and ended in the early 1950's before the publication of the Fauteux report. During this lengthy period, the principle of restraint was restricted to apply to the living conditions which prevailed in Canadian prisons, particularly in Kingston Penitentiary. The harshness of prison discipline, effected through physical punishment such as flogging, was denounced repeatedly by numerous reports. The turning point was the publication of the Archambault Report in 1938. This report recommended "that the revengeful or retributive character of punishment should be completely eliminated" (p. 9). The Archambault Report was the last important report which did not question the use of imprisonment

per se. The concept of restraint for this first period called for moderation in the administration of punishment rather than addressing the broader question of the imposition of sentences themselves.

The second period concerning the evolution of the principle of restraint was very brief. It began in 1956 with the publication of the Fauteux report and ended in 1969 with the release of the Ouimet Committee report. One of the principal findings of the Fauteux report was the degree to which sentences in Canada were more severe than elsewhere in the world:

We are particularly struck by the fact that the length of sentences imposed in Canada, when compared with those imposed in England for comparable offences, are generally much greater (p. 18).

The Fauteux Committee gave a much broader meaning to the principle of restraint than had been understood in the first period, where the concept of restraint was restricted to the conditions of incarceration. In this second period, restraint was to be applied in the context of the sentencing process itself and was to guide judges in the determination of sentences. It was also to assist correctional authorities in the exercise of their discretion respecting the early release of inmates:

Throughout this Report great importance is attached to the concept of reformation and rehabilitation... In a modern correctional system "the first principle is to keep as many offenders as possible out of prison" (Herbert Morrison, Home Secretary, United Kingdom, 1944). When all of the alternatives to imprisonment have been exhausted, there will remain certain classes of offenders who must be sent to prison (p. 46).

The final period in the development of the principle of restraint ranges from the publication of the Ouimet Committee report in 1969 to the present. The Ouimet report was dated by some aspects of its proposals, such as its emphasis on rehabilitation. However, the more innovative recommendations in the report triggered a new beginning in Canadian penology. For example, whereas previous reports referred to sentences as "punishment", the Committee designated them as "dispositions" or as "measures". The Committee also stressed the need for "alternative dispositions" (p. 193) which provided sanctions for criminal conduct without removing the offender from the community (p.309). However, the most original contribution of the Ouimet Committee report was to extend the context of the principle of restraint from the sentencing process to the legislative process itself by advocating moderation in the use of the criminal law generally.

No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means (p. 12).

These proposals were further developed by the comprehensive work of the Law Reform Commission of Canada. Within the scope of this brief chronology, it is impossible to fully acknowledge the critical role played by the Law Reform Commission of Canada in clearly articulating the principle of restraint and in giving it such prominence in current penal philosophy.

It is difficult to go beyond the theoretical foundation laid by the Law Reform Commission of Canada respecting the principle of restraint. What is now needed is not further theoretical development of this concept but a policy which transforms the principle of restraint into a reality.

Endnotes

- ¹ The main source for the description of these events is a study undertaken for the Commission by Professor Martin L. Friedland of the Faculty of Law and of the Centre of Criminology of the University of Toronto. Unless we specify otherwise, we shall closely rely upon Professor Friedland's study, which we will at times simply paraphrase. However, the facts will be presented according to a particular perspective and the chapter will stress the significance of certain events.
- ² Professor Alvaro Penna Pires of the Department of Criminology of the University of Ottawa was requested by the Commission to write a *compendium* of statements on different aspects of incarceration, which are to be found in official reports issued in Canada by the federal and provincial governments and in the general literature. Dr. Pires's study will be the primary source for the content analysis of reports and literature on the penal system and, particularly, on incarceration.
- ³ Stat. U.C. 1800, c.1.
- ⁴ See Talbot (1983; 152-53), *Justice in Early Ontario, 1791-1840*.
- ⁵ See, for example, English statute 7 & 8 George IV, 1827, c. 27 and c. 28.
- ⁶ Stat. U.C. 1833, c. 3.
- ⁷ Stat. U.C. 1800, c.1, s.5.
- ⁸ See Talbot (1983; 150).
- ⁹ The statute is 4 George I, 1717, c. 11. For an analysis of the issue of transportation in England, see Thomas (1978; 3-4), *The Penal Equation*.
- ¹⁰ Stat. Can. 1842, c.5, s.4.
- ¹¹ See Thomas (1978; 30).
- ¹² See Thomas (1978; 32).
- ¹³ See Rusche, G. and Kirchheimer, O. (1939). *Punishment and Social Structure*.
- ¹⁴ Committee of the House of Assembly (1831). *Report in the Journal of the House of Assembly*, Appendix, pp. 211-212. Also quoted in Jackson (1983; 26-27).
- ¹⁵ Quoted in Beattie (1977; 82).
- ¹⁶ See for example, Stat. U.C. 1883, c. 3; Stat. U.C. 1837, c.4, s.3 and s.4; Stat. U.C. 1837, c.6, s.1; Stat. U.C. 1838, c.11, s.1.
- ¹⁷ Stat. Can. 1841, c. 24.
- ¹⁸ Stat. Can. 1841, c. 24, s. 24 and s. 30.
- ¹⁹ Stat. Can. 1841, c. 25, containing 70 sections; Stat. Can. 1841, c. 26, containing 42 sections and Stat. Can. 1841, c. 27 containing 44 sections.
- ²⁰ Stat. Can. 1842, c. 5, s.2.
- ²¹ 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.
- ²² See Lapin, M.A. and Patrick J.S. (eds., 1951; 40-41). *Index to Parliamentary Debates on Confederation of the British North American Provinces*.
- ²³ Lapin and Patrick (eds., 1951; 41).
- ²⁴ This problem has been documented in several publications of the Law Reform Commission of Canada. For example, Law Reform Commission of Canada (1974c), *Studies on Sentencing*; Law Reform Commission of Canada (1976), *Our Criminal Law*; Law Reform Commission of Canada (1976b), *Studies on Imprisonment*, and the Law Reform Commission of Canada (1977), *Guidelines; Dispositions and Sentences in the Criminal Process*.
- ²⁵ See *The Second Report of the Commissioners of the Penitentiary Inquiry*, pp. 71-73. This was the report of the 1848 Brown Commission.
- ²⁶ The earlier Charlottetown Conference had taken the same position: see Appendix 4, "A Brief Legislative History of Penitentiaries Prior to Confederation" in the government document dated

April 29, 1976, *Bi-lateral Discussions on the Division of Correctional Responsibilities Between the Federal Government and the Government of British Columbia*.

²⁷ See the above-quoted document.

²⁸ See Needham (1980; 339).

²⁹ See *Royal Commission to Investigate the Penal System of Canada* — the Archambault Commission (1938; 339 *et seq.*). See also *Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* — the Fauteux Committee (1956; 50).

³⁰ See *Canadian Committee on Corrections* — the Ouimet Committee (1969; 279 *et seq.*) and the Law Reform Commission of Canada (1977).

³¹ See Herbert (1902), *Speeches on Canadian Affairs by the Fourth Earl of Carnarvon*.

³² See *Second Report from the Commissioners on Criminal Law*, (1836; 24). This report deals with capital punishment, but it is indicative of their views. See also the *Seventh Report of the Commissioners on Criminal Law* (1843; 92). Thomas (1978; 20 *et seq.*) also discusses this issue.

³³ See Cross (1978; 5), "The Report of the Criminal Law Commissioners (1883-1849) and the Abortive Bills of 1853" in Glazebrook (1978).

³⁴ See Thomas (1978) and Cross (1978) for the history of the English Criminal Law Commissioners.

³⁵ See Home Office Report (1979; 23). Sentences of Imprisonment.

³⁶ Greaves, C. (1861; xlv). *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict.* with notes and observations. London: Stevens. Also cited in the Home Office Report (1979; 24).

³⁷ Stat. Can. 1859, c. 91 ss. 20 and 21.

³⁸ Hansard, House of Commons, April 23, 1869, at 54-55.

³⁹ Compare in this regard 24 & 25 Vict., 1861, cc. 94-100 with Stat. Can. 1869, cc. 18-36.

⁴⁰ Hansard, House of Commons, April 27, 1869, at p. 89.

⁴¹ See *Digest and Summary of Information Respecting Prisons in the Colonies, supplied by the Governors of Her Majesty's Colonial Possessions, in answer to Mr. Secretary Cardwell's Circular Dispatches of Jan. 16 and 17, 1865. C. 3961, 1867*.

⁴² Journal of the Legislative Assembly (1849), Appendix B.B.B.B. Cited in Beattie (1977; 156 *et seq.*).

⁴³ See generally, Calder (1979; 50-51). *The Federal Penitentiary System in Canada*.

⁴⁴ See Stephen (1874, reprinted 1967; 52). *Liberty, Equality, Fraternity*.

⁴⁵ See Stephen (1883; 98-99). *A History of the Criminal Law of England*.

⁴⁶ Hansard, House of Commons, May 19, 1892, col. 2840.

⁴⁷ Hansard, House of Commons, May 25, 1892, col. 2972. See generally, Parker (1981) in Flaherty (1981).

⁴⁸ See 742 *et seq.* of the 1892 Code. See generally, Del Buono (1978).

⁴⁹ See s. 744(4) of the 1892 Code.

⁵⁰ Stat. Can. 1921, c. 25, s. 22; see also Stat. Can. 1923, c. 41, s. 9.

⁵¹ Those amendments are fully documented in Friedland (1980; 18).

⁵² See the Archambault Report, p. 9.

⁵³ Hansard, House of Commons, March 30, 1915, at p. 1782.

⁵⁴ See the *Prison and Reformatories Amendment Act*, S.C. 1913, c. 39, s. 1. The provision was extended to British Columbia in 1948: see the Ouimet Committee Report, at p. 283.

⁵⁵ *Criminal Law Amendment Act*, 1977, Stat. Can. 1976-77, c. 53, s. 46(3).

⁵⁶ *Criminal Code Amendment Act*, Stat. Can. 1947, c. 55, s. 18. See generally Morris (1951). *The Habitual Criminal*.

⁵⁷ *Criminal Code*, Stat. Can. 1953-54, c. 51, s. 660(2).

⁵⁸ See the Ouimet Committee Report (1969; 243).

Chapter 3

Current Situation and Problems

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Chapter 3

Current Situation and Problems

1. Introduction

1.1 Overview of the Current Situation

As a way of resolving disputes, the criminal justice system is best thought of as an institution of last resort. Although people often have disputes with each other or with their government, most of these, fortunately, do not end up in the criminal courts. As an institution of last resort, the criminal justice system holds the power to impose the most severe forms of control on people within this society. A wide variety of powers are given to the criminal justice system. The criminal law itself defines the kinds of conduct for which people can be held criminally liable. Rules governing the criminal trial provide the framework within which guilt or innocence may be determined. The sentence imposed by the judge is the one point in the process, however, at which the power to impose sanctions, as provided by the law, is most visibly exercised.

Although the criminal justice system has the power to impose a wide range of sanctions, it is sometimes seen as having purposes well beyond this. It is sometimes seen as a system whose goal is to control a person's behaviour, or to define the activities that are prohibited in society, or to make better people out of some of us. There have been arguments over the years as to whether the criminal justice system does or could contribute to meeting these goals or, indeed, whether the criminal justice system should aspire to these goals. However, there can be little argument about one thing: the criminal justice system is a system whose purpose is, at least in part, the identification of those who have acted in ways that are unacceptable to society and on whom, as a result, certain sanctions can be imposed. Among these is the right to punish people and, under many circumstances, to impose severe terms of imprisonment. If nothing else, then, the criminal justice system is a system that often punishes people.

The perspective of the criminal justice system as a system which emphasizes punishment now appears to be held by many people who are charged with criminal offences (see Casper, 1972, Ericson and Baranek, 1982).

Quite understandably, most accused people who appear before the courts are interested in the punishment that they might receive even though, as some authors have suggested (e.g., Feeley, 1979), going through the process itself may serve as the penalty. In Canada, we use our most severe punishment — imprisonment — more than most other western countries (Correctional Service of Canada, 1986).

What is remarkable about our criminal law is how little direction is given in our legislation on the determination of sentences. For historical reasons outlined in Chapter 2, we have, in Canada, a system of prescribed maximum penalties that effectively has distanced Parliament from the actual sentences that are to be imposed for all criminal offences other than murder and high treason.

1.2 The Absence of Policy: A Comparison

Criminal sanctions provide the potential for the most serious intrusions of the state into the lives of individuals. The absence then, of a clear policy regarding the imposition of these sanctions seems quite remarkable. In other areas of a person's life, Parliament has taken a much more active role. In taxation, for example, not only are the purposes of a particular tax policy fully debated and discussed, but the actual level of burden (or potential burden) on a given citizen is expressed as clearly as possible in the legislation. If the level of specificity of criminal sanctions were to be translated into the area of income tax, it would be as if Parliament were to pass a tax bill indicating that certain kinds of income were to be taxed at a rate "of up to 34%" to accomplish goals that were never specified. Courts, then, on an individual basis, would be expected to weigh such factors as the impact on individual incentive, job creation and the taxpayer's ability to pay, to come up with a set of individual cases from which general principles might be derived. Courts would make decisions independent of one another and there would be no mechanism for resolving differences across provinces. Indeed, individual provinces might differ on which factors would be relevant in determining the amount of federal income taxes to be paid.

If there existed this amount of ambiguity in the laws governing personal income tax, undoubtedly the government would act quickly to change the situation. Most citizens would not tolerate such ambiguity and would not view it as appropriate that policy and practice on such an important matter be left exclusively to the courts in the absence of any legislative direction. Clearly, all issues could not be resolved completely unambiguously by Parliament and indeed, certain issues would have to be resolved or interpreted by the courts.

In the area of criminal law, however, we have long tolerated this kind of ambiguity. One reason is that the most severe sanctions of the criminal law — unlike income tax — affect only a small minority of the population. Another reason that there has not been great political pressure on Parliament to take a more active role in providing guidance for the determination of sentences is

that there has not been a vocal or clear consensus on the direction that we should be moving in. Finally, as one submission to this Commission noted, “there is no great groundswell of concern generally in Canadian society as a whole crying out for reform in our sentencing processes. The group which has the most to gain from sentencing reform, those convicted of criminal offences, have in fact the least effective lobby.”

Although appellate courts have developed principles of sentencing, these principles are not applied uniformly in practice, nor are they accepted by all sentencing judges. The reasons underlying the imposition of a particular sentence are sometimes unclear and often not articulated. The person sentenced, those responsible for the administration of the sentence, and the public remain uninformed as to the principles underlying the sanctions and the reasons for these sanctions.

1.3 Sentencing: Problems

It would be wrong to suggest that there is a perceived crisis in sentencing. Although commission after commission over the past 50 years has expressed the view that there are fundamental issues to be resolved in the area of sentencing, no Parliament in the history of Canada has undertaken a comprehensive review of the fundamental issues in sentencing. Indeed, until the Law Reform Commission of Canada reported on sentencing in 1976, Parliament had never received a report whose exclusive focus was on the determination of sentences. Even the Law Reform Commission’s report dealt only with select issues in sentencing and did not contain a comprehensive set of recommendations.

The fact that there is no general perception of a crisis does not mean there are no serious problems. Crises in the criminal justice system are usually seen to be rather dramatic short-term events such as prison riots and hostage takings. A problem that builds up slowly and is not very public, such as the overcrowding which has occurred in certain prison systems, may not seem to be a crisis by those who are neither inmates nor guards. Prison overcrowding is an ominous problem and it is clearly related to the issue of sentencing. There is evidence that the public is not enthusiastic about spending additional funds on prisons. When given a choice between building more prisons or spending more money on alternatives to imprisonment, 70% of the public chose the latter (Research #3). Hence, it is consistent with public opinion to seek solutions which involve examining carefully how we use prison space.

Public knowledge about sentencing and related issues are reviewed in Chapter 4. As noted in that chapter, a substantial portion of the public knows little about sentencing (maxima, minima or current practice). Nevertheless they are not content with the severity of sentences that are handed down. It is easy to suggest that the problem lies not with sentencing practices, but elsewhere. After all, studies (Doob and Roberts, 1983) suggest that if they were given more adequate information about the actual sentencing hearing, the

public would be considerably more satisfied with the sentence imposed. This approach, however, ignores two important issues. First, saying that the public could be made more content if they had better information does not get them that information nor does it make the public more content. Second, although such information would presumably enhance public acceptance of individual sentences, it would do nothing to make policy in sentencing more accessible and understandable.

The public's understanding and acceptance of the criminal justice system is critical. The adage "justice must not only be done but must be seen to be done" reminds us that belief in the ultimate fairness of the justice system is central to the legitimacy of a government. The appearance of "justice" in a justice system is not a peripheral nicety — it is central to its existence. In Canada today the lack of information and absence of clear principles on sentencing obscures the process of justice and makes it difficult to see whether justice is done.

2. Commentary on Perceptions of the Problems in Sentencing

2.1 Commentary

As part of its research program, the Commission not only surveyed closely the existing research in the area of sentencing (*Roberts, 1985*), but it also commissioned exhaustive reviews of commentaries on sentencing: from researchers, other experts, and from official reports (*Pires, 1984, 1986*). It is noteworthy that on certain key topics, a substantial amount has been written. For example, when one puts together significant extracts (usually a paragraph or two from any one source) of commentaries on disparity in Canada, one ends up with 92 pages of (brief) extracts. When one puts together a few paragraphs mostly from official documents, criticizing the use of imprisonment in Canada and which advocate, directly or indirectly, moderation in the use of imprisonment, one ends up with a 140 pages of extracts. As noted in Chapter 2, critical commentary of some aspect of sentencing is not hard to find. To illustrate, a few of the many statements made in the past 25 years concerning the problems of sentencing are reproduced here (*Pires, 1984*):

These variations [in sentencing] are a rather predictable finding, but one certainly worth presenting, as it is common knowledge that wide differences in philosophy and practice exist among magistrates. There are lenient judges and harsh judges, as every prosecution and defence counsel well knows (Jaffary, 1963).

It should be emphasized that the major criticism herein lies not in the fact that some courts are adopting principles that are not as good as they might be, but the fact that completely different and sometimes opposing sentencing principles should exist at all with reference to the same Act; i.e., the *Criminal Code*. Unfortunately, we find extraordinary discrepancies in almost all aspects of sentencing... (Decore, 1964).

Disparity between courts in sentencing practices...is an acknowledged fact. It also seems reasonably clear that such dispositions are accounted for more adequately by the beliefs and goals of the decision maker than by the objective facts of the individual case (Edwards, 1966).

The most obvious fact which emerges from the findings is that there are enormous differences among magistrates in nearly every aspect of the sentencing process. Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information, and in the sentences they impose (Hogarth, 1971).

Sentencing practices in drug cases are characterized by a wide disparity across Canada (Commission of Inquiry into the Non-Medical Use of Drugs, 1972).

Research in Canada and the U.S. has clearly identified sentence disparity as a matter of concern for the criminal justice system (Canada, Solicitor General, *Criminal Justice Research — A Selective Review*, 1981).

The most significant concerns in sentencing can be grouped into three categories. First, there are no clear policies or principles of sentencing in Canada. Second, there is an apparent disparity in the sentences awarded for similar crimes committed by similar offenders in similar circumstances... These...types of concerns are clearly interrelated, since the lack of clear policy on sentencing may both encourage disparity and reflect the lack of meaningful or clearly effective sentencing alternatives (Canada, The Criminal Law in Canadian Society, 1982).

While the Commission does not necessarily endorse all that is written in these quotes, they are listed here to demonstrate the concerns expressed from time to time about equity, clarity and predictability in the sentencing process. These quotations in fact, are but a small proportion of what has been said about the problem of disparity in Canada. Most criticism in the literature on sentencing focuses on the issue of disparity: perceived or real, warranted or unwarranted.

2.2 Perceptions of Problems

One of the difficulties in identifying whether there are problems with the sentencing process is that those working in the area deal with the system on a case by case basis and so tend to adapt to the difficulties of the system. What might be determined to be a problem as a result of careful analysis, may not be perceived as a problem by those working in the system. They may be so used to coping with it that they do not identify it as problematic. Second, while the most accomplished practitioners deal so well with a fault in the system that for them it is not important, for the remainder it may still be a serious problem.

In this context, it is interesting to note that the submission to this Commission from the Canadian Bar Association did not acknowledge there to be any problem with disparity in sentencing. Their conclusion is as follows: "Some variation in sentencing is to be expected. Without it, sentencing practices would not reflect differences in individual cases and community standards or regional priorities and concerns." This can be contrasted with the fact that more than 80% of a sample of over 700 Crown and defence counsel

surveyed by the Commission indicated that there was unwarranted disparity in their own jurisdiction and more than 90% of the same group perceived there to be unwarranted disparity across Canada (Research #5).

Finally, it is to be expected that various interest groups would differ on what constitutes a problem. An issue identified by one group as a problem will not necessarily be so identified by another group.

In addition to receiving submissions from individuals and organizations, the Commission made a special effort to assess on a systematic basis the views of a large number of professional groups within the criminal justice system. Defence and Crown counsel in six provinces were asked to fill out a questionnaire dealing with a number of issues related to sentencing. Questionnaires were sent to every judge having the jurisdiction to sentence people (or review sentences) in Canada. Other criminal justice professionals and inmates were also interviewed.

2.2.1 Judges

Every group that had any contact with this Commission felt that there was a need for some change in sentencing. Clearly there was not unanimity about the direction of change, but there was near unanimity about the desirability of some changes. Many judges felt, for example, that minimum sentences sometimes created injustice; some noted difficulties with the parole system and almost three-quarters of the judges surveyed perceived there to be a fair amount of variation from judge to judge in the way a specific case would be sentenced (Research #6).

2.2.2 Crown and Defence Counsel

As previously mentioned, almost all lawyers (over 90%) — both defence and Crown — in a survey carried out in six provinces felt that there was at least some unwarranted variation in sentences across Canada and many (about 40%) thought that there was a great deal of unwarranted variation. Sentences that were closer to these respondents — those within their own jurisdiction — did not fare much better. Over 80% of Crown and defence counsel thought that there was at least some unwarranted variation in sentences handed down in their own jurisdiction. This is not surprising since over 95% of the over 700 Crown and defence counsel surveyed thought that the particular judge who imposed the sentence was at least somewhat important in determining the sentence, with over 80% identifying this factor as being very important. Not surprisingly, most of these 700 (of whom the majority spend at least half of their time doing criminal law) think that the identity of the sentencing judges should *not* be an important factor in determining the sentence.

Crown and defence counsel saw other problems in the overall sentencing process. Most, for example, expressed the need for changes in parole, and most

Crown counsel and over a quarter of defence counsel saw problems with mandatory supervision (at least as it existed before the recent *Act to Amend the Parole Act and the Penitentiary Act* (S.C. 1986 c. 42) was passed).

2.2.3 The Police

The Canadian Association of Chiefs of Police similarly saw the need for sentencing reform. They noted, for example, that “there is little agreement as to which sentencing principles should be applied to any particular case”. More importantly, the Chiefs of Police identified the importance of a more understandable and predictable sentencing system: “If provided only with principles, however, in spite of (or perhaps because of) them, disputes will not be eliminated with respect to sentencing in specific cases unless more specific direction is supplied...”. They, like others noted that disparity in sentencing is a serious problem: “Unfortunately, there have been too many cases in which the police, and others, have felt that the sentence did not ‘fit’ the crime, whether the ‘unwarranted disparity’ took the form of an unduly lenient or harsh sentence.” They note that “these disparities in sentencing very often result in a loss of confidence in the system.”

2.2.4 Parole and Probation Officers

The Commission had surveys conducted on its behalf of non-legally trained criminal justice professionals (largely probation and parole officers) in the Atlantic provinces (*Richardson, 1986*) and in Quebec (*Rizkalla, 1986*). From their perspective, there were a number of problems. In both regions, over 80% of those who ventured an opinion felt that some offences of different degrees of seriousness had identical maximum penalties. A substantial portion in each region (34% in Quebec and 56% in the Atlantic provinces) perceived there to be unjustified variation in sentencing. The majority (57%) of the respondents in Quebec and about one-third (32%) of the respondents in the Atlantic provinces indicated that they thought that too many prison sentences were being imposed. Other more specific problems were also noted as well.

2.2.5 Prisoners

Prisoners as well, identified a number of areas of concern. Almost all 165 prisoners interviewed in British Columbia perceived there to be variation in the sentencing severity of different judges (*Ekstedt, 1985*). The majority (70%) of a separate sample of native prisoners in the western provinces indicated that they believed that they would have received a different sentence if they had been sentenced by a different judge (*Morse and Lock, 1985*). A substantial proportion of B.C. prisoners surveyed perceived there to be some unjustly long sentences (76% disagreed with the statement that “unjust long sentences are pretty rare”) and several stated that there were also unjustly short sentences (39% disagreed with the statement “unjustly short sentences are pretty rare”).

About two-thirds of the respondents felt that “the laws should give more direction to judges on how short or long a prison sentence should be.” The majority (64%) also indicated that parole procedures were unfair. Although it would be unreasonable to expect that prisoners would be happy with their current situation, it does appear that they are concerned not just with the severity of the sentences they received but also with the equity of application.

2.2.6 Submissions

Other groups also saw problems in the current system of sentencing. The Law Reform Commission of Canada, for example, in a brief to this Commission noted that “As a document intended to give expression to fundamental values, our *Criminal Code* ought to be a statement which bears some relation to what happens in the real world”. They note that in many ways, it does not. They also note with approval the view that “the legislature ought to assume more control over the sentencing process....”. In describing the current situation, the Law Reform Commission of Canada stated that “Excessive discretion is conferred on a wide range of police, prosecutors, judges and prison/parole officials. Equality, clarity, and truth in sentencing are sacrificed.... Disparity becomes more pronounced in the absence of authoritative statements of purpose and principle. Prison overcrowding intensifies.... The current scheme creates disparity, and therefore fails to promote equality, in a variety of ways”.

The Canadian Association of Elizabeth Fry Societies notes that “sentencing decisions have been (or at least have been perceived to be) unreasonably disparate.” They suggest that one way of dealing with this problem would be the “enactment of sentencing principles”. Sentencing principles and purposes, they feel, could help provide “reasonable limits on judicial discretion, not to bind the values of future generations to come”. However, they feel that “discretion should be left with sentencing judges to apply the policy to particular cases”. They see maximum sentences as unrealistically high and recommend the abolition of mandatory minimum terms of incarceration.

Various John Howard Societies also made extensive representations to the Commission. Generally speaking, their independent views of the nature of the current problems were similar. The John Howard Society of Canada, for example, noted that “it does not appear rational to cling to the individualized approach [to sentencing] with each judge more or less free to select his/her own starting point, objectives and relevant criteria”. More specifically, they note that “a primary concern for the principle of just deserts or proportionality and a concern for equality under law and coherence in sentencing policy requires not only a legislative statement about sentencing principles and policies, but a legislative statement that sets priorities. We also believe that such a statement is necessary in order that people may know what the law is, and have ready access to it”. The John Howard Society of Ontario expressed the view that

there exist “serious problems of sentencing disparity between and even within courts”. Guidelines, they noted, “would assist provincial appeal courts maintain some consistency between one province and the rest”. However, as the John Howard Society of Alberta noted “there is an almost complete lack of legislative guidance as to the principles to be followed in the exercise of the very wide discretion given judges in the sentencing process in Canada”.

On a related, but somewhat different topic, the John Howard Society of Alberta suggested that “imprisonment in Canada and its over-use remains the central issue in sentencing policy and practice. It is suggested that there are abuses in the use of imprisonment and that one such area of abuse concerns the sentencing of non-violent offenders against property to varying terms of imprisonment, without consideration of the non-custodial alternatives available”. This view was repeated in various forms by the other John Howard Societies (Canada, Ontario, Ottawa; all of which recommended increased use of community sanctions).

Most groups close to the criminal justice system, then, expressed concern over problems in sentencing that could not be solved by minor alterations. The Law Reform Commission of Canada and the John Howard Societies of Alberta and Ontario all expressed the need for a permanent sentencing commission to monitor and revise sentencing guidelines.

2.3 The Need for an Integrated Set of Reforms

Clearly, much has been written on the problems of sentencing and many submissions identified a variety of issues. However, although there is little, if any, consistency in sentences or in approaches to sentencing, there does seem to be some consensus in the assessment of what the problems are. One of the most basic problems that has been identified in the literature in the past 25 years is that there is no overall explicit statement of purposes and principles of sentencing. It is clear that the problems of sentencing are not going to disappear through minor tinkering with the existing legislation.

Indeed, as has been noted in Chapter 2, the past century has seen a steady stream of minor changes in the laws relating to sentencing. It is possible that part of the reason for the lack of fundamental reform in sentencing — despite occasional calls for it — is that those interested in reform were aware of the necessity for an integrated reform of the whole sentencing structure. Such reforms are more difficult to propose if the terms of reference of the Commission include either very broad sets of issues (such as the Ouimet Commission) or are narrow in their original focus (such as the Archambault Commission). In any case, the major problems persist. A comprehensive examination of sentencing and an integrated set of reforms is essential.

3. Structural Deficiencies in the Sentencing System

Parliament has never given much overall guidance to the sentencing judge, the offender, or the general public, on what kind of sentence should be imposed in any particular case. Changes that have been made by Parliament do not, and indeed could not, provide the necessary integrated reform. The reason is simple: it is impossible for a particular change to fit into a structure that itself lacks consistency. The nature of the difficulties in sentencing can be seen by examining closely a number of different aspects of the context in which sentencing takes place. This Commission has concluded that the problems of sentencing have to do with the structure in which sentencing takes place rather than with the quality of the decision-makers themselves. Thus it is important to examine closely the nature of these problems.

3.1 Lack of Systematic Information about Sentencing

One of the most basic failings of the current sentencing system in Canada is that there is no method for anyone (not a judge, accused, lawyer, member of the public or policy maker) to know in a systematic, up-to-date, and accessible manner, on a continuing basis, what kinds of sentences are being handed down. The Statistics Canada Courts program (which provided sentencing statistics) was by the 1960's and 1970's being phased out. Published in 1978, the 1973 data on sentences in criminal cases were the last reasonably comprehensive sentencing data to be released by Statistics Canada. It had been hoped that the re-organization of the justice statistics section of Statistics Canada into the Canadian Centre for Justice Statistics would have improved matters in the area of court-based data. It has not. Aggregate statistics from the courts on sentencing criminal cases are not available from the Centre. There is no reliable indication of when they might be available.

The lack of timely aggregate sentencing statistics presents problems for the operation of the criminal justice system. For a Commission such as this one, it posed a very serious difficulty. As matters stood when the Commission was established in 1984, there were selective aggregate statistics (Hann, Moyer, Billingsley and Canfield, 1983), often obtained from correctional authorities, which dealt with only a portion of sentencing and which dealt with only a short (and varying) time period. These data were extremely useful for some purposes and gave the Commission an idea of what was happening in certain areas, but for others were less than satisfactory. The Commission then spent considerable time putting together statistics from a number of independent sources to gain an accurate "snapshot" of sentencing as it was occurring in the first half of this decade. Among the sources we looked at were an update of the 1983 study (Hann and Kopelman, 1986), detailed statistics (especially on long sentences) from Correctional Services Canada, and a sample of sentences from an analysis of the RCMP criminal record history data-base. After a large expenditure of effort, the Canadian Sentencing Commission was able to obtain statistics sufficient for carrying out its task.

However, there is a need for comprehensive statistics, gathered at their source (the courts) on a national and continuing basis. On the basis of the Commission's experience in trying to obtain data and the performance to date of the Canadian Centre for Justice Statistics in this area, given competing priorities, there is no reason to be optimistic about how soon we will achieve the level of statistical breadth and timeliness in the area of sentencing statistics that we had 20 years ago.

It should be pointed out that aggregate sentencing data on a national basis are difficult to obtain for a number of reasons including the following:

The federal/provincial division of powers over criminal law and its administration has the effect of making the federal government dependent on unanimous agreement from the provinces in order to obtain uniformly-formatted statistics from across the country. In addition, the federal government's requirements may differ somewhat from those of the provinces. In some instances, then, the provinces might be asked to collect information that will not be of direct or immediate use to them. Much can be written about this general problem in this and other areas. It is sufficient to say that the federal-provincial split in jurisdiction has serious implications in this area.

Different concerns of different groups can lead to different data being needed. To the extent that there are sometimes large costs involved in the collection of data, issues such as whether each count on a multiple charge indictment is coded or whether only the "most serious" charge is recorded are very important.

The decision of what constitutes the unit of analysis is often neither obvious nor agreed upon. From the perspective of correctional authorities, for example, the total length of time may be most important, whereas from the perspective of those involved in or interested in the determination of sentences, the sentence on the individual count may be most important. Given that sentencing in cases involving multiple counts is done in different ways in various parts of the country, these puzzles are not easy to solve.

Few countries besides England and Wales have good continuing aggregate court statistics. Hence the problems are not just those of countries such as ours with multiple levels of jurisdiction. The problems are not easily solved. They are, however, important and, if there is to be continuing attention paid to sentencing in this country, we will have to have, at least on a sampling basis, reliable and up-to-date indicators of what is happening in our courts.

3.1.1 Sentencing Information for the Sentencing Judge

Like everyone else, a sentencing judge cannot get an overall picture of sentencing in Canada. Probably more relevant to the sentencing judge's needs, however, would be more detailed information on current practices and decisions of the judge's own Court of Appeal. Detailed information on a systematic basis about recent similar cases does not, for the most part, exist anywhere in a readily-accessible format. One project is operating on a trial

basis in a number of provinces to provide such information to sentencing judges, but it is too early to know what its value will be.

The traditional sources for judges to turn to for sentencing information are the reported judgments of Courts of Appeal and, occasionally, trial courts. These reports are generally available to most judges. The difficulty, then, is not their availability but is the ease with which they can be used. Simply put, much of the information that a judge would need to know about appeal court decisions on sentencing is contained in published reports; most judges are, however, too busy to be able to spend the hours necessary first to find, and then to digest the relevant published materials. Existing large-scale computerized retrieval systems are useful for some purposes but are not easily accessible to most trial judges. A few years ago, the *Canadian Sentencing Handbook* was produced by the Canadian Association of Provincial Court Judges with funds from the Department of Justice, Canada. This is seen by some judges as a useful source of information about principles of sentencing as enunciated by the various Courts of Appeal. It appeared in 1982 and has not been updated.

In some provinces Court of Appeal decisions are distributed systematically but not in an organized or easily accessible format. In one province, and soon in three or four more, there is a small-scale computer retrieval system in place in some provincial court-houses. These allow judges to access all recent relevant Court of Appeal judgments without special training. As already noted, however, having easy access to and receiving clear guidance from these judgments are, unfortunately, two quite different matters.

3.1.2 Implications of Having No Systematic Sentencing Data

In Canada over 1,000 independent decision-makers are handing down sentences for over three hundred different offences in the *Criminal Code*, *Narcotic Control Act*, and *Food and Drugs Act* (Parts III, IV). On rare occasions, one of these sentences is made known to others through casual conversation, formal discussion, or because it was published. In the absence of any formal guidance, it would be almost impossible to expect no variation in the severity of sentences from judge to judge. Not only because of differences in the way an offence was viewed in different communities, but simply because different judges in the absence of national policy and in the absence of knowledge of what was happening elsewhere would simply arrive at different conclusions.

It is unfair to criticize individual judges for arriving at different conclusions regarding how a given case should be sentenced. In the context in which these decisions are being made, sentencing judges have no other way of carrying out their responsibilities. Indeed, even if different sentences were to be given to essentially identical cases, there is no method, in the current sentencing structure, to evaluate which, if any, of the sentences is appropriate. In the present system, where there are no formal "standards" against which to judge a sentence, the lack of systematic sentencing information accessible to judges in their determination of sentences almost ensures that there will be unwarranted variation in sentences.

3.2 The Absence of an Adequate Penalty Structure: Maximum Penalties

Traditionally, the statutory maximum penalties have been reserved for the worst possible instance of the offence committed by the worst possible offender. In reality, however, in most instances, such cases almost never occur, or in some instances, simply do not occur. Indeed, a survey of all sentence appeals handed down by the British Columbia Court of Appeal from September 1983 through the spring of 1986 demonstrates that for some offences (e.g., break and enter a dwelling) maximum sentences have not been recently endorsed by the highest level of court in that province.

An examination of the current pattern of legislatively-prescribed maximum penalties quickly indicates that as a guide to what the worst cases would look like, Canada's statutory maxima are inadequate. At present, life imprisonment is the maximum sentence available for a large number of offences including manslaughter, aggravated sexual assault, breaking and entering a dwelling, possession of a narcotic for the purpose of trafficking and certain forms of perjury. A maximum term of ten years in prison is prescribed for sexual assault (including most instances of what used to be termed rape, where weapons are not used and serious physical bodily harm does not result), assault causing bodily harm, theft over \$1000 and unauthorized use of a computer.

Most people who offered advice to the Commission in the area of maximum penalties agreed that existing penalties do not provide sufficient guidance. Many working within the system, however, did not see this as a serious problem since their knowledge of current practice effectively allowed them to ignore the legislated maxima. Only 16% of the judges who responded to the Commission's survey thought that "the pattern of maximum penalties is fine the way it is now and should not be altered." Forty-eight percent of the judges thought that a revision of maximum penalties might or definitely would be an improvement. Thirty-six percent indicated that they thought that the maximum penalty structure was not very useful as a guide in sentencing, but changes would not improve anything. As one judge noted, "I regard maximum penalties as Parliament's guideline to the gravity of the offence. True, it is not presently a very sensitive instrument by which to measure the gravity. I would welcome any revision to make it more indicative of Parliament's views, but that may be difficult to obtain."

Judges' opinions were divided on the utility of an overall revision to create maxima that would be closer to the sentences actually imposed. As one judge noted: "The going range for the usual case is [already] known [to the judge]". The problem, of course is that the going ranges are not necessarily known to all. In addition, judges may differ on what they see as the "going range". Two-thirds of the judges surveyed indicated they felt that the current situation where maximum sentences are seldom handed down conveys a false impression to the public.

A narrow majority (56%) of the defence counsel who responded to the Commission's survey favoured an overall revision of maximum sentences, though most (72%) Crown counsel opposed it. Interestingly enough, however, most defence (65%) and most Crown counsel (81%) felt that the current system of maximum penalties gives a false impression of sentencing to the public.

To the extent, however, that prescribed maxima are supposed to have any meaning for the general public, it is important to go beyond the views of those who have already learned to ignore legislated maxima. Most members of the public do not have enough knowledge to allow them the luxury of ignoring some apparently pertinent information. For example, in a survey of editorial policies on sentencing stories in the news media carried out for this Commission (*Rosenfeld, 1986*), one reporter is quoted as having mentioned that by referring to the statutory maximum sentence available to the court "you're probably leaving the listeners with the impression the guy probably should have gotten more. I also include when the offender will be back on the street again, to point out that I thought — even though I wasn't saying it — that I think this is a travesty of justice; I was indirectly telling the listener that I thought it stunk". As if responding to this comment, one judge in the survey carried out by the Commission noted that "Every media source always says what the maximum sentence is — even though they have rarely ever been used. It is absurd."

In Chapter 4, it is noted that a substantial portion of the Canadian public think that sentences are too lenient. To the extent that the public sees the maximum penalties enacted by Parliament as the prime determinant of sentences, one can easily understand the public's discontent. However, the public does not know most maximum penalties. If they knew them and misinterpreted their meaning in current sentencing structure, they would undoubtedly be even less pleased with sentencing as it is carried out than they are at the moment.

In conclusion then, there are two quite separate problems with the current maximum penalties: they are unrealistic, and in most cases too high. Any serious guidance they might give the sentencing judge or the public is lost. Second, they are disorderly: the relationship between the seriousness of offences and their maxima is inconsistent. Little guidance for anyone can be expected from these maxima.

3.3 Mandatory Minimum Penalties

Apart from murder and high treason, there are only seven offences (among those considered by the Commission) which have minimum fines or terms of imprisonment prescribed by law. In Chapter 8 it is noted that the offences that carry mandatory minimum penalties do not constitute a clearly identifiable group where one can easily imagine that the least serious instance always requires, in order to do justice, a minimum penalty. Other than the

police, few individuals or groups who had contact with the Commission, argued for maintaining or increasing the number of offences carrying mandatory minima. Furthermore, it is openly admitted in some instances that legislative intent is undermined by administrative practice. For example, if the Crown is seeking a higher penalty because of a person's previous convictions, notice has to be served on that person before a plea is received in court. The *Criminal Code* specifies a mandatory term of imprisonment for all persons convicted of a second or subsequent offence involving drinking and driving. Evidence exists that various provinces have developed guidelines on when such notice should be served, thus effectively circumventing the legislative requirement of a minimum term of imprisonment. In other instances, different methods have been found for avoiding minimum penalties. As one judge noted, however, "mandatory minimum sentences can be a problem and produce such gross injustice that prosecutors become the persons who determine sentences."

One frequently-cited argument in favour of minimum penalties is that they serve to deter people from committing the offence. At first blush, this would seem to be a sound view. However, there are two hidden and incorrect premises on which this logic is based.

In the first place, it is assumed that the presence of minimum sentences is known to those who might possibly otherwise commit an offence. Evidence from public opinion surveys (see Chapter 4) suggests this is not the case. The second hidden premise is that people have a reasonably high expectation of being caught. Again, this does not seem to be the case.

Looking at the evidence on deterrence, much of which was accumulated in the context of impaired driving (see Ross, 1982), it is clear that variation in penalties are not important in determining the number of drinking driving offences in a community. One factor that may lead people to believe that minimum penalties are relevant to the level of offending in a community is that often when there is a modification of the penalty structure for an offence as prevalent in our society as impaired driving, there may also be a temporary increase in real and perceived estimates of the likelihood of apprehension. The police might begin a well-publicized crackdown on drinking drivers and for a short time people might perceive the likelihood of their being apprehended for impaired driving to be higher than before. After a short period of time (usually measured in weeks or a few months, but not years), things return to normal as people change their estimate of the likelihood of apprehension.

It appears that the only time that there is a clear effect of minor changes in statutory penalties on people's behaviour is when people perceive there to be a reasonable likelihood of apprehension. Then, within certain ranges, it is reasonable to assume that people will govern their behaviour, to some extent, according to the formal legal consequences of being found guilty of an offence.

The strongest argument against mandatory minimum penalties is, of course, that they do not reflect the reality of the wide range of circumstances in which offences are committed and in which offenders find themselves. At

present, for example, the indigent single parent of three children, (who, when driving a borrowed car, is stopped at random at 4:00 a.m. on a nearly deserted highway and, although showing no signs of impaired driving, fails a breathalyzer test, which was administered because the police officer detected the smell of alcohol) must be given a fine of at least \$300, even though it is fully acknowledged by all (Crown, defence and judge) that he or she cannot pay. Fifty-seven percent of the judges responding to the Commission's survey (Research #6) thought that mandatory minimum sentences restricted their ability to give out just sentences. Another 34% thought that their ability to give out a just sentence was restricted by mandatory minima only rarely. However, as one judge asked, "Are injustices acceptable because they are rare?"

A fuller discussion of the issues surrounding minimum penalties can be found in Chapter 8. At this point, suffice it to say that mandatory minimum penalties create at least as many difficulties as they attempt to solve.

3.4 Parole and Early Release

A sentence of imprisonment is expressed in terms of a fixed time period. Most members of the public understand this to mean an offender will serve this time in custody. Provisions of the statutes governing early release ensure that almost nobody actually serves the full amount of time in custody that is stated by the judge in court. In the most simple terms, most people are eligible to be considered for release on full parole after serving one-third of their sentence; if a person is not released on parole, but has not misbehaved in prison, he or she is likely to be released after serving two-thirds of the sentence in custody and may serve the remainder of the sentence on mandatory supervision. The effect of these provisions is that most people given custodial sentences serve between one and two-thirds of their sentence in custody. There has been a lot of controversy over early release in recent years.

Whatever else parole might be, it is, in the present situation, a discretionary system appended to a discretionary system. Its effects on the term of imprisonment appear to be unpredictable in some instances and systematically unrelated to the reasons for imprisonment in others. Finally, knowledge of the existence of parole appears to have an uneven impact on the original sentence itself.

Briefly, some of the problems that have been noted are:

- Discretionary early release (parole) is based primarily on a theory and a skill neither of which is generally accepted as plausible. The theory — rehabilitation — suggests that when in prison, the offender may change for the better as a result of his experiences. Moreover, it assumes that as a result of these changes he may be assessed as having received full benefit from the prison experience. The skill that is no longer considered plausible is that predictions of future criminal behaviour can accurately be made on an individual basis. Parole as it presently exists in Canada

assumes that the information necessary to make predictions of future criminal behaviour is available after but not before a person has served a substantial portion of his sentence.

- Discretionary early release leads to uncertainty about the actual severity of the sentence.
- The proportion of sentences actually served in custody appears to be inversely related to the severity of the sentence handed down by the judge. In the case of some specific offences, those offenders receiving the longest sentences tend to be released after serving a smaller proportion of time in custody than those originally given shorter sentences. In effect, then, the National Parole Board might be seen as evening out sentences, or, alternatively, as undermining the sentences of the court (Solicitor General of Canada, 1981).
- Although in law, judges are not supposed to take the possibility of early release into account when sentencing offenders, Ruby (1980; 317) appears to be correct when he says that “it does appear, with all respect, that regardless of what courts of appeal may say, judges, being practical men, will bear in mind the possibility of parole in assessing sentences. It may be that in practice sentences today are somewhat longer than they might otherwise be because of the assumption that the parole board will interfere at a future date.”

The majority (59%) of the judges who responded to the Commission's questionnaire felt that there probably should be changes from the present situation where an offender can be granted full parole after serving one-third of his or her sentence. Most defence counsel thought that the current system of parole should be changed (52% of the respondents) or left the same (42%). Only 6% were in favour of abolishing it. Although the majority of Crown counsel (65%) also thought that the current system of parole should be changed, a substantial number (25%) thought it should be abolished. Eleven percent favoured leaving parole as it is.

The public, it seems, does not understand the distinction between parole and release on mandatory supervision. As well, they believe that parole authorities are far more lenient than they actually are. Most of the public (65%) thought that only certain offenders should be eligible for parole. Twenty-three percent thought that parole should be abolished and only 9% favoured the current system where everyone is, at some point, eligible for release on parole. The groups the public most often mentioned as being the ones which should never be eligible for parole were murderers and sex offenders. As in other areas, then, it would appear that the public's main concern is with violence and less with the largest group of prisoners — property offenders.

3.5 Sentencing and the Role of the Victim of Crime

It is at the stage of sentencing that the criminal justice process often reveals its inability to adequately address the concerns of victims of crime. There is an expectation that justice will be done, or at least be seen to be done by the person most affected by crime — the victim. There are, however, structural problems which prevent this expectation from being realized.

While the role of the victim is unclear at the time of sentencing, that is but a symptom of the more deeply ingrained problem — the role of the victim vis-a-vis the criminal law. The structure of criminal law is one that allows two adversaries to engage in the dispute — the state and the accused. Consequently, the accused is afforded protection throughout the process in order to ensure that rights are respected and that innocent persons are not convicted let alone punished. The process, however, affords little opportunity for victims to voice their concerns. Although there is an expectation at the time of sentencing that a judge ought to alleviate their plight, the role of the judge throughout the process is to ensure that justice is done — not specifically in the eyes of the victim, but primarily in the eyes of society and the accused. Hence, one cannot expect that the question of how the role of the “forgotten” victim might be enhanced can satisfactorily be answered at the sentencing stage. There are ways in which victims might be better included in and informed about the determination of the sentence, and these are issues that the Commission will address throughout the report. The ultimate issue, however, of the role of the victim in the criminal law process is beyond the mandate of this Commission. The Commission’s terms of reference do not address important procedural issues such as the role of the victim at the sentencing hearing.

As many have noted, the victim in our criminal process has no official role other than, in many cases, being a witness for the prosecution. Although the only special status that a “real” victim has is that of witness, victims clearly have interests beyond those of witnesses. Victims help define the seriousness of the offence. Victims have a special interest in sentencing in that they are the ones who have usually been responsible for bringing the offence to the attention of the police and of identifying the offender. But their involvement is more important than that: they have a special personal interest in seeing that justice is done.

One difficulty with the present system of sentencing is that the victim, like all others affected by the process, has no way of knowing whether justice was done through the imposition of an appropriate sentence. Indeed, as a result of charging practices and plea bargaining, the victim may not even recognize the offence that results in the conviction. The reasons for this are complex, but the complexity is largely the result of a lack of clarity and predictability throughout the process. In addressing the lack of clarity and predictability in the process and in constructing a framework to encourage the exchange of information between all those involved in and affected by the sentencing process, the recommendations of this Commission will address at least some of the very real and practical concerns expressed by victims.

One concern expressed by many victims is that for most offences there is no provision in law which acknowledges that they should receive redress for the harm done to them. Although there are some provisions in the *Criminal Code* for restitution to the victim for losses related to property (e.g., sections 653 and 654), there is no mandatory provision that requires the sentencing court to attempt to provide redress to victims for the harm done to them. In providing more guidance to judges as to the greater use of community sanctions, and in establishing clear principles supporting the use of reparative sanctions, the Commission hopes that victims will benefit from these reforms. In terms of sentences of imprisonment, the Commission has concentrated a number of recommendations in Chapter 10 in the hope that the true meaning of these sentences in terms of actual time served will help victims to better understand the sentence imposed by the judge. If not the answer to all the questions, this at least provides an important step to a better understanding of the whole process.

3.6 Courts of Appeal

The importance of developing a uniform approach to address the problems created by unwarranted disparity in sentencing is repeated in the literature and the jurisprudence. The ability of Courts of Appeal to provide the necessary guidance to achieve this goal is, to a large degree, determined by the legislative framework within which they must operate. Whether the current structure for sentencing appeals allows for the development of a national sentencing policy, is a question raised not only by the mandate of this Commission, but that has been asked in the past, by other Commissions. The Ouimet Report (1969, p. 215) expressed the following concern about the structure of Appeal Courts in Canada:

The...concern is that the development of a consistent sentencing policy is hampered by the absence of specialist courts charged with the responsibility for synthesis and exposition of principle.

In 1892, the *Criminal Code* adopted by Canada prescribed a very circumscribed role for the review of sentencing decisions by Courts of Appeal. Appeals by both the defence and Crown were allowed if the sentence imposed by the trial judge was one that could not be imposed by law. So, for example, if the trial judge imposed a sentence in excess of the maximum penalty, the Appeal Court could review and amend that sentence. It was only in 1921 that Canadian Courts of Appeal were given the power to hear appeals on the grounds of the “fitness” of the sentence. The jurisdiction of these courts was thereby extended to review not only those sentences that were wrong in law but also those sentences that did not appear “fit”. The current section of the *Criminal Code* that outlines the power of review on these grounds reads as follows:

- s.614. (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or
 - (b) dismiss the appeal.
- (2) A judgment of a court of appeal that varies the sentences of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

Unfortunately, when the review power of Appeal Courts was extended, no definition of “fitness” was provided by Parliament. Although over the years, various tests of “fitness” have been described in the jurisprudence, there is no consensus among the different provincial courts as to what the precise nature of that test should be. Nadin-Davis (1982) describes the problem:

How should the Court approach the task of determining whether a sentence is “fit”? Two philosophies appear in the jurisprudence — either the Court should determine what is a fit sentence, and compare, or it should carefully review the reasoning process and reasons of the trial Judge, and, if error is found, make the necessary correction. (pp. 564-565).

The different approaches to the question of fitness illustrate another structural impediment to achieving a uniformity of approach to sentencing: in Canada there exist not one, but ten final Courts of Appeal. Although the Supreme Court of Canada has jurisdiction to hear appeals on all sentencing matters, it is the policy of the court to hear only those sentence appeals involving questions of law (*R. v. Gardiner* [1982] 2 S.C.R. 368). Questions of fitness are left to individual Courts of Appeal.

A review of the fitness of a sentence necessarily requires a consideration of the particular case before the court. Although recently some Courts of Appeal have gone beyond the particular facts before them to make a pronouncement of “tariff”¹, only a few Appeal Courts specifically set out a range (e.g., the starting point in sentencing a robbery of a convenience store is three years), and ranges have been established for only a few offences. Other Courts of Appeal have attempted to provide guidance in the case of broadly-defined offences. Hence for narcotics offences, for example, they have attempted to break down the offence according to its subject matter (i.e. through examples of “hard” and “soft” drugs) and indicate ranges that reflect the more serious or less serious subject matter of that offence.

Even if Appeal Courts in all provinces became more involved in writing “tariff” judgments, the scope of the judgments would still be limited by the nature of the cases heard by the court. Development of policy on a case by case basis is the history of our common law. One of its drawbacks is that if the court wishes to make a pronouncement of principle or range for sentencing cases of break and enter, for example, it must wait until an appropriate break and enter case appears before it. Hence critics have argued that policy should not be left to Courts of Appeal since the disproportion between the number of sentence appeals and the large volume of criminal cases makes it unlikely that Court of

Appeal judgments will have a real bearing on the mass of cases decided by lower courts (see Ashworth, 1983).

As to the nature of the small number of cases appealed, there is a question as to whether Appeal Courts ought to make general policy on the basis of the limited selection of serious or unusual cases that they are most likely to see. As a County Court Judge noted:

It is clear that appeal judges in most provinces have felt it necessary to lay down rather stern sentencing guidelines in drug cases. Appeal judges are much more isolated from the drug offender and social circumstances than lower court judges. Moreover, their experience tends to be based on a biased sample of cases coming before the courts. They tend to see the more serious cases. (*R. v. Fairn* (1973), 22 C.R.N.S. 307 at 311-312)

The question of whether Courts of Appeal can provide the necessary guidance to ensure a uniformity of approach to sentencing in Canada will be addressed later in this chapter. What is stressed here is that the current structure of sentence appeals was developed for the review of individual cases and is not one that easily lends itself to the formulation of a national sentencing policy.

4. Effects of the Structural Deficiencies in Sentencing

4.1 Disparity: An Introduction

As pointed out in the previous section, there are severe deficiencies in the structure of sentencing in Canada. The most serious deficiencies can be described as follows:

- The absence of a uniform approach to the theory, purpose or principles of sentencing;
- Almost no systematic knowledge of current practice;
- Maximum penalties provide almost no realistic guidance as to the relative seriousness of offences or actual practice;
- The perceived inequity of mandatory minimum penalties;
- Wide ranges of behaviour subsumed under one offence category;
- Little unambiguous and systematic guidance from Courts of Appeal;
- Over 1,000 judges, with varying sentencing philosophies, regularly imposing sentences in criminal matters across the country with few opportunities for communication among them;
- An acceptance of the concept of “individualized sentencing”;
- The lack of accountability in either the charging practices of police and prosecutors or plea negotiations;
- Variation across and within provinces in the availability of many sanctions other than the imposition of terms of imprisonment.

Within this context, it is almost impossible for any sentence handed down in Canada to be judged unambiguously unjust. Given there are an almost infinite (or at least a very large) number of dimensions on which two cases can vary, and given that there are no over-riding principles that specify either a priority system of purposes of sentence or the weight that should be given to different factors, almost any two cases can be differentiated along at least one dimension that could justify differential sentencing.

Even if the relevant factors are agreed upon and the priority that they are to be given is clear, the problem is not solved or avoided. If it were decided that a person's role in an offence, or the amount of premeditation, or the offender's criminal record were to be relevant, two judges could easily assess these in different ways. At this point, however, disparity due to differential assessments of similar "facts" is a less immediate problem than lack of consensus of what should be assessed in the first place. If the more basic problems were solved, it would make sense to turn to this second level of concern.

Whether disparity in sentences exists depends on one's theory of sentencing. In order to identify which sentences are unwarranted, and in order to do something about disparity, one needs to have a theory about how sentencing *should* take place, and what the *correct* sentence really should be. If one accepts the view that all sentences handed down for a given offence should not be the same, one needs a "theory" or set of principles to determine how the variability in sentencing should be governed. Assuming that such a coherent theory were to exist, one could begin to examine the evidence for unwarranted variation in sentences and the different ways in which unacceptable variation in sentences can appear within the Canadian criminal justice system.

A typology of unwarranted variation in sentences would include the following:

- Case to case: the same judge may give different sentences to similar offenders convicted of the same offence committed in similar circumstances; (alternatively, the same judge may give the same disposition in cases that differ on relevant dimensions);
- Judge to judge: different judges may approach similar cases in different ways and as a result of the different approaches, they may assign different sentences;
- Court to court: different courts in the same or different provinces may, for various reasons, have developed different standards for what is an appropriate sentence for particular types of cases. These different standards may not be related to factors such as the perceived severity of the offence in the community, the frequency with which the offence takes place or other factors that Courts of Appeal sometimes say are relevant in sentencing offenders.

Whatever theory or set of principles is seen as an appropriate guide for sentencing, it is unquestionably a form of "unwarranted disparity" if identical

cases were to receive different dispositions as a result of being heard by different judges. The problem with the current situation is that two judges suggesting different sentences for an identical case might both be “right” (or, for that matter wrong) if one accepts the legitimacy of different priorities being given to different purposes or principles of sentences. Unwarranted variation, then, would appear to be almost inevitable.

The Commission heard, from time to time, from various people, including judges, who stated that they did not believe there to be evidence of disparity. Although their reasons vary, most seem to believe that the perception of apparently unjustifiable disparity is due to incomplete knowledge of the case(s) in question. They seem to believe that if one looked more closely, a factor that differentiated two cases or a factor that justified the particular sentence could be found. In a sentencing system governed by clear principles, such *post hoc* analyses would not be acceptable or possible. Under the present sentencing structure, however, such analyses are not only possible, but, are encouraged. If a large, or perhaps infinite, number of factors can be considered to be relevant, then almost any sentence can be justified.

An acceptance of the present state of sentencing in Canada can be seen at times as a preference for more ambiguity rather than less. The Canadian Bar Association, in its brief to the Commission suggested that the statement of principles that was contained in the Criminal Law Reform Act, 1984 (Bill C-19) be amended in certain ways. One suggestion was that the reasonably clear statement “a sentence should be similar to sentences imposed on other offenders for similar offences committed in similar circumstances” be replaced by “arbitrary disparity of sentences should be avoided”. The major difficulty with their suggestion is that the process of determining what constitutes “arbitrary disparity” involves much more of a value judgment than does the determination of what factors are most relevant in determining whether offences or circumstances are similar.

As noted above, the problem of unwarranted variation in sentencing is not caused by the judges who are doing the sentencing but rather is located within the system or structure in which the sentences are handed down. One would expect, therefore, that almost inevitably there would be variation in sentences handed down in similar or identical cases. Indeed, the present system not only tolerates varying dispositions in similar cases (and similar sentences given in different cases) but it breeds such unacceptable variation.

4.1.1 Disparity: Perceptions of the Problem

The majority (74%) of the over 400 judges who responded to a survey for this Commission (Research #6) indicated that there was at least a “fair amount of variation from judge to judge” in the way a specific case would be sentenced. The real difficulty, however, was noted by more than one judge. For example, one judge wrote that “There is variation but to what extent it is unwarranted is difficult to say”. Or, as another judge put it, “There appears to

be variation. I cannot say if it is unwarranted or a reflection of the differences in our provincial conditions.” Other judges were more certain: “There is far too much variation from judge to judge,” wrote one judge. In many ways, of course, the Commission was asking an impossible question. Few if any judges in Canada have sufficient information on which to evaluate the sentences of others. Those who indicated that they thought that there was a problem were most likely to identify the different personal attitudes and/or approaches of judges to sentencing as the cause.

The question asked of defence and Crown counsel was more direct and the results less ambiguous (Research #5). Almost 19% of defence counsel and 29% of Crown counsel endorsed the view that “there was a great deal of unwarranted variation” in the sentences handed down in their own jurisdiction. An additional 75% of defence counsel and 63% of Crown counsel thought that there was some unwarranted variation. In other words, approximately 93% of defence and 92% of Crown counsel were of the opinion that there was at least some unwarranted variation in sentences in their own jurisdictions. In each of the six provinces surveyed for both Crown and defence counsel, at least 80% recognized this problem in sentencing.

When asked about unwarranted variation across Canada the results were even more dramatic. Forty percent of defence counsel and 41% of Crown counsel thought that there was a “great deal of unwarranted variation” in sentences handed down across Canada. Indeed, all but about 3% of the almost 700 respondents thought that there was at least some unwarranted variation across Canada.

Defence and Crown agreed both with the judges and the analysis suggested here: the primary reason for this unwarranted variation was seen to be different personal attitudes and/or approaches of judges.

There is no question, then, that those within the system perceive there to be unwarranted variation. As indicated earlier in this chapter, unwarranted disparity was also noted by many other groups and individuals as a problem worthy of attention.

4.1.2 Unwarranted Variation: The Evidence

As stated above, until one has a coherent theory of sentencing, it is impossible to determine whether variation in sentences handed down for a given offence (or a number of different offences) is appropriate. How, then, in the absence of such a theory can one determine whether there is unwarranted variation? The answer is reasonably straightforward: one can look at sentencing practice as well as the perceptions of those who have direct experience with the criminal justice system.

There is, however, a problem of methodology which makes it easy for people to deny the existence of any form of disparity. Since unwarranted

variation implies that the variation cannot be justified, demonstrating the existence of disparity requires an examination of the particular circumstances of individual cases. This is best accomplished by an in-depth analysis of criminal cases as documented by a researcher present in court. However, given its time consuming nature, this form of research can investigate only a limited number of cases and sometimes requires resorting to experiments which use hypothetical cases (e.g., Palys, 1982). To gather statistics on a large sample of cases, on the other hand, provides the numbers, but not the details. Hence, research conducted to demonstrate the existence of unwarranted disparity can be dismissed as unrepresentative (given the small sample of cases) and hence, as insignificant. Research, rich in numbers, can be dismissed as indicating only variation since it lacks the detail required to prove unjustified variation. So, just as it is demanding and difficult to prove the existence of a significant degree of unwarranted disparity, it is quite easy to simply deny its existence.

We can now turn to the question of whether any data exist on unwarranted variation in sentencing. Probably the best known research on sentencing in Canada — John Hogarth's 1971 book, *Sentencing as a Human Process* — did not focus on disparity *per se*. Instead, the focus was on the manner in which judges went about determining the sentence in a particular case. Briefly, Hogarth found that the penal philosophy and judicial attitudes of the sentencing judge determined the kind of information that the judge heard and found important which, in turn, determined the sentence. There was more consistency across judges who had similar judicial outlooks than there was across judges generally. Knowing the "facts" of the case was not as useful in predicting the sentence as knowing how a judge defined the case before him. From Hogarth's data it is clear that different judges would be expected to sentence similar cases differently. It is also quite clear that a necessary condition for changing this while maintaining individualized sentencing would be to create a common approach to sentencing.

Hogarth's general finding — that the judge's sentence was related to his or her penal philosophy and judicial attitudes — was replicated in another large-scale study of sentencing. Palys and Divorski (1984) report the results of a simulation exercise carried out with over 200 Provincial Court Judges who were attending judicial seminars. Five hypothetical cases were used and judges were asked, among other things, to indicate what sentence they would recommend. In all five cases there was variation in the sentences that were recommended; in some cases the extent of it was quite dramatic. What is most important, however, is that the purpose of sentencing emphasized by the judge was related to the severity of the sentence imposed. In other words the penal philosophy of the individual judge seemed to be an important determinant of the outcome.

It should be noted that the amount of apparently unwarranted variation in sentences seems to vary from case to case in experiments such as these. It is not clear whether variation is linked to specific facts of the cases or to specific offences (or some combination of the two). Hence it is somewhat difficult, in

much of this research, to estimate the degree of variation in sentencing due to differences among judges since extensive studies on this topic have not been carried out. It is clear, however, that for all combinations of fact situations and offence, there is some variability in the sentences recommended for the identical cases and in some instances the amount of this variability is dramatic.

Simulation exercises such as that carried out by Palys and Divorski (1984) and studies such as that by Hogarth (1971) run the risk of reflecting difficulties in the methods. Specifically, some have suggested that judges in these studies may have given less thought to the exercises than they would have given to real cases. As a result, they may have answered some of the questions more casually than they would have in a real situation. These casual answers, then, would be expected to be more random, showing unwarranted variation where it does not really exist. This is an important and plausible argument. However, the data from the studies do not support this criticism. In particular, if the variation in the sentencing of identical cases was due to random error, it should not be systematically related, as it was, to other factors such as the judge's penal philosophy.

Another source of information on the issue of disparity are studies that compare sentences across jurisdictions. Some such data were presented in the 1984 report of the federal Department of Justice on *Sentencing* (Canada, 1984). It was recorded in that report that for assault causing bodily harm, but not for fraud, there was wide variation across provinces or other geographic units in the proportion of convicted offenders who were incarcerated. Similar results have been found in other Canadian studies (see, for example: Jaffary, 1963; Jobson, 1971; MacDonald, 1969). A recent study by Murray and Erickson (1983) showed wide variation in the use of different dispositions across Ontario jurisdictions for certain cannabis offenders.

A study on *Long Term Imprisonment in Canada* undertaken for the Ministry of the Solicitor General has shown that sentences for second degree murder were noticeably higher in Quebec than elsewhere in Canada (Canada, 1984a; 16-17). Statistical analyses conducted by the Commission and the Department of Justice revealed that there were significant differences in the sentences handed down by the courts in different provinces (Hann, Moyer, Billingsley and Canfield, 1983; Hann and Kopelman, 1986). Data collected on the sentences imposed across Canada for most criminal offences in the *Code* revealed that the spectrum of sanctions used by the judges in sentencing particular offences (e.g., gross indecency, procurement, assault causing bodily harm and numerous other offences) was very wide, encompassing fines, probation, suspended sentences and provincial and federal terms of incarceration. This is indicative of the existence of some unwarranted disparity, since offenders convicted, for example of the offence of assault causing bodily harm are liable to receive sentences ranging from a fine to a penitentiary term. The Commission also undertook research on the fine as a sentencing option in Canada (Verdun-Jones and Mitchell-Banks, 1986). According to the researchers, "there is a wide disparity in the length of prison sentences that

offenders are serving in default of payment of fines of the same amount. Some offenders are serving their fines at the rate of \$3.00 per day, while others are serving them at the rate of \$70.00 per day”.

Findings such as these — where variation is found across communities — are somewhat difficult to interpret in the absence of a clear theory of sentencing. In particular, it could be argued, at least on a *post hoc* basis, that there were some factors on which the communities (or cases) varied that could legitimate this variation. If this were the case, however, one would expect that such factors would be well-known and accepted. In most cases where variation across localities has been found, this was not known prior to the study. It is, therefore, somewhat difficult to argue that this variation was a result of a purposeful decision to have different sentencing policies.

These findings, and others like them, taken in the context in which sentencing occurs in this country, strongly suggest that there is considerable unwarranted variation in sentencing. The findings that the sentence is closely associated with the particular sentencing philosophy of the judge supports the suggestion made earlier that the primary difficulty with sentencing as it exists at the moment is that there is no consensus on how sentencing should be approached. As noted in the previous section, this is the cause most often noted by judges, lawyers, and other commentators.

4.2 An Over-Reliance on Imprisonment

As already stated, Canada has a relatively high rate of imprisonment compared to most western democracies (see Chapter 11 for a more detailed breakdown of Canada’s incarceration rate).

In many ways, this is not surprising given the structure of sentencing in Canada. The *Criminal Code* defines penalties principally in terms of a maximum term of imprisonment, which may be imposed. It may do this expressly or implicitly by reference to the offence as a summary conviction offence. All summary conviction offences in the *Criminal Code* (except contempt of court) carry a maximum penalty of a term of imprisonment not exceeding six months and/or a fine of up to \$2,000. In this context, all sanctions other than imprisonment appear to be “alternatives” to incarceration because they are not expressly indicated as available penalties for individual offences.

Much concern over the years has been expressed concerning our level of dependence on incarceration as the “standard” penalty for criminal offences. In the submissions to this Commission, most groups and individuals called for restraint in the use of custodial sentences and advocated a greater use of community sanctions. At the same time, it was noted that there was a need for a wider range of community sanctions than exists at the moment:

Only when a wide range of sentencing options are available in our communities can we expect to see a more significant reduction in the use of

incarceration and a greater emphasis on the reconciliation of the victim, offender and community (Canadian Association of Elizabeth Fry Societies, 1985).

[S]pecial care must be taken...to see that expensive prison resources are not squandered away on relatively harmless offenders, but reserved for the most serious cases (The John Howard Society of Canada, 1985).

The Quaker Committee on Jails and Justice urges that community options become the norm for sentencing...Any one of these would be a more appropriate response than the present norm, incarceration (Quaker Committee on Jails and Justice, 1985).

The following points were made by individuals:

Canadians...are seriously misinformed about the economics of the criminal justice system. Judges rarely, if ever, consider the costs of pronouncing a sentence...The costs of imprisonment are staggering and they would fail on any cost-benefit analysis.

There are many factors which may explain the...high rate of imprisonment in Canada. First of all, the law is for the most part, quite punitive. By this, there doesn't seem to be alternatives for imprisonment legislated into the Criminal Code.

Prison should be for violent offenders. Non-violent offenders should be sentenced by other alternative measures (translation).

Prison has come to be seen as the ultimate sanction and is therefore used even though there may be no pragmatic necessity for it.

Given that the *Criminal Code* presumes incarceration to be the standard penalty and leaves it to the courts to decide when an "alternative" would be appropriate, it is important to look to the Courts of Appeal to see if they have been able to provide guidance more in keeping with much of what has been said over the years about restraint in the use of imprisonment and imprisonment as a last resort.

5. Courts of Appeal: A Solution?

The preamble of the Commission's mandate states that "...unwarranted disparity in sentences is inconsistent with the principle of equality before the law". In order to achieve equality before the law in the sentencing process, there must be some guidance to ensure consistency in the application of the laws and practices. To evaluate whether Courts of Appeal can provide the necessary guidance to ensure a uniformity of approach to sentencing in Canada one must first ask what kinds of guidance are required to achieve this goal.

There are three essential questions integral to the determination of a just sentence. First, and most generally, what is the purpose or aim underlying the imposition of this sentence? Second, what type of sanction does this particular crime deserve? Third, if imprisonment is the only appropriate sanction, what is the length of imprisonment that this particular crime deserves? There will never be a simple answer to any of these difficult questions. More important

than the answer, however, is that judges across the country have a common approach to these questions. Whether the Courts of Appeal can provide the necessary guidance to ensure at least a shared approach will be examined below.²

5.1 General Principles

Since appellate review of the fitness of sentences began in 1921, volumes have been filled with case law on sentencing, but by and large the principles that have been established are general in nature and have neither served as a structure for, nor limit upon, the vast discretion bestowed upon the sentencing judge.

The need to achieve uniformity was not traditionally considered to be a valid objective of sentence appeals since our process was modeled on the principle that each sentence should be tailored to suit the individual offender as opposed to the individual offence. This view dominated the jurisprudence until the mid-sixties, when the courts of appeal first recognized that *uniformity of sentence* was a valid objective and that appeal courts could review sentences if there had been marked departure from “sentences customarily imposed in the same jurisdiction for the same or similar crime” (*R. v. Baldhead* (1965), 4 C.C.C. 118 (Sask. C.A.)).

Although this shift in jurisprudence cleared the path for the development of appellate guidelines and ranges, appeal courts have shown a reluctance to embrace the notion of uniformity for fear that broad general principles will fail to take into account the unique characteristics of each offender (as illustrated by a 1983 decision of the Nova Scotia Court of Appeal in *R. v. Campbell* (1983) 10 W.C.B. 490, “...it is always necessary to make the punishment fit the criminal rather than the crime”).

In the first chapter of *Sentencing in Canada*, Nadin-Davis (1982) reviews the “Philosophical Aims and the Practice of Sentencing”. Having conducted an exhaustive review of the jurisprudence, he concludes:

It appears almost customary to preface a discussion of sentencing with an abstract discourse on the philosophy of sentencing, or at least a list of its aims. An emphasis on what courts *do*, however, relegates such analysis to the second level of importance, as courts infrequently involve themselves in any real examination of the aims of the sentencing process. Where they do venture into these murky waters, their statements are often misleading and confusing (p. 27).

The same conclusion was reached in the studies conducted for this Commission (*Young, 1984, 1985*). A review of over 1,000 sentencing decisions of courts across the country revealed that although general principles of sentencing are discussed in some judgments, there exists no consensus as to either the priority of principles or their meaning. In fact, in a discussion of sentencing principles in the *Canadian Sentencing Handbook* (1982), the text refers to the importance of “blending” sentencing principles:

There are no fixed formulas to pre-determine the outcome of blending or balancing the principles as individualized in a given case. By the very nature of the principles themselves the offence must be brought to a focus in a given community at a given time in terms of an all too human drama. As MacKay, J.A. pointed out in *R. v. Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.) the "blend" or the "balance" of the various factors will not only vary according to the offence and its nature, but also as to time and place (p. 26).

It is not that Courts of Appeal, or trial courts, never state the principles underlying their approach to sentencing, it is that they do it infrequently and when they state these aims, the practice of blending and balancing results more in obscuring their approach than developing a uniform approach to sentencing aims.

To make it even more difficult to extract guidance from the jurisprudence, there is a general tendency for Appeal Court judgments to dispose of sentencing matters in a cursory manner. Hence, even when a case provides what appears to be an ideal opportunity to enunciate a general principle to guide a judge as to the type of sanction to impose in a particular case, the matter will likely be dealt with in a single sentence (e.g., "...using our best judgment as to what is in the interest of society, we will change the two year sentence to suspended sentence and probation").

When a principle is cited, it is most likely to be "general deterrence". This principle currently provides the most frequently cited justification for the imposition of a custodial term. Judgments still occasionally cite rehabilitation as a rationale but it is used to support a decision not to incarcerate and to justify the imposition of a community sanction to better suit the needs of the individual.

Some courts have complained that the principle of general deterrence to justify a sentence of imprisonment represents the "illogicality of punishing one person for what others might do" (see *R. v. Burnchall* (1980), 65 C.C.C. 505). Many trial court judges complain that higher courts *only* consider interests of general deterrence in reviewing fitness. Tariff sentencing is evidence that general deterrence is gaining the increasing support of Appeal Courts. As will be discussed below, tariffs are, in essence, a form of minimum sentence that in most cases require the sentencer to impose a term of imprisonment. Although the tariff approach adds some certainty to the process, it is based on a presumption of incarceration that runs contrary to the principle of restraint in the use of custodial sanctions.

As to how a judge's approach to sentencing aims actually affects his or her sentencing practice, a study as reported in *Sentencing* (Canada, 1984; 17) had revealing results:

A recent study involving "simulated" cases revealed considerable variation among sentences when some 200 judges were asked to assign sentences in the same set of cases. As the study was a simulation, it is of course only suggestive of actual practice. However, the study did show that the differences in sentences were related to the difference of opinion among the judges regarding

the appropriate aim of sentencing in each case, the weight to be attached to particular objectives, and the relative importance to be attached to particular facts.

The individual judge's approach to the aims of sentencing thus has far-reaching implications for the sentence he or she will impose. To date, the Courts of Appeal have not issued judgments resulting in any kind of uniformity of approach to the general principles of sentencing in Canada.

5.2 Custody or a Community Sanction: The In/Out Decision

Given that a sentence of incarceration represents the most severe sanction the state can impose on an offender, justice demands that the decision of whether to incarcerate must be based on clearly-articulated principles, whether legislative or judicial.

The *Criminal Code* provides little guidance to judges as to when to impose imprisonment as a sanction. With the exception of the few mandatory minimum terms of imprisonment prescribed, the *Code* provides only that the punishment is to be "in the discretion of the court". There have been recent legislative reforms in other jurisdictions to provide judges with some direction to aid them in the determination of the decision of whether to incarcerate ("in") or to impose a community sentence ("out"). A legislature may, therefore, construct, with varying degrees of specificity, guidelines concerning the decision of whether to impose custody or a community sanction.

Given that there are no legislative guidelines to structure the "in/out" decision in Canada, the Commission reviewed the jurisprudence to uncover whether Courts of Appeal had filled this important gap by establishing principles which would guide judges in their approach to this most difficult determination. Perhaps the most significant finding arising from an extensive review of the jurisprudence was that although judgments reveal no clear principles to guide the in/out decision, there exists a presumption in favour of incarceration for most offences reviewed by the courts. "Tariff" judgments generally take the form of providing a "starting-point" for a sentence of incarceration. Tariff judgments simply put numbers (quantum) to the presumption of incarceration so that, for example, robbery no longer simply carries a presumption of incarceration, but carries a three year presumptive term (e.g., in Alberta) unless "exceptional circumstances exist". Unfortunately, little guidance is given regarding the nature of the circumstances necessary to depart from the presumption. Simply put, the guidance is not directed to whether a judge should impose a sentence of imprisonment or a community sanction but rather presumes the "in" decision and directs judges as to the "starting point" for the length of term to impose.

Trial court judges appear more sceptical of this over-reliance on incarceration and many judgments have expressed concern regarding the tariff or presumptive incarceration specified by Appeal Courts. Although the principle of restraint as cited by the Ouimet Committee and the Law Reform

Commission of Canada has had an impact on some judgments, and although in 1975 the Alberta Court of Appeal stated that "... the offences which require a prison sentence grow fewer and fewer as more humane and varied types of punishment are developed" (*R. v. Wood* (1975), 26 C.C.C. (2d) 100 at 107), studies of the jurisprudence reveal that if there is any operative principle in the case law to guide the in/out decision, it is the principle that certain offences must attract custodial terms.

The case law reveals no general principles as to what factors justify a departure from the "in" presumption. Courts typically consider factors peculiar to the accused and his or her circumstances, and have not developed a general rule or approach.

Given the structural problems discussed earlier, which determine the number and nature of cases heard by Courts of Appeal, it is no wonder that any guidance that is provided by the jurisprudence has as its focus only the more serious sanctions. Although there has been a movement by some Courts of Appeal toward providing more guidance in the form of tariff judgments, it is clear that although these judgments may provide for a uniform approach to what the "starting point" for a sentence of imprisonment ought to be for a given offence, they provide no guidance to judges in their consideration of an even more difficult question — whether to impose a community sanction or to resort to the most onerous sanction of imprisonment.

5.3 Imprisonment: Setting the Range

As described earlier, the term "sentencing tariff" is often used to describe the role of appeal courts in establishing guidelines for the determination of sentences. In the past seven years there has been a very gradual movement in some provinces toward a specific delineation of a sentencing range. Not only do *few* appeal courts specifically state a presumptive range for sentences of imprisonment, but ranges have been established for only a few offences.

For the most part the use of a specific tariff or starting point has been confined to sentencing for robbery, sex offences and drug offences in the provinces of Alberta, Nova Scotia and New Brunswick.

The approaches to tariff also differ. The Alberta tariff is far more offence-oriented (with a focus on offence characteristics: e.g., unsophisticated, commercial outfit, absence of harm, modest success) whereas the Nova Scotia tariff is offence as well as offender-oriented (offender characteristics are listed: e.g., intoxication, youth, previous good character, etc.).

Another difference of approach is that the Nova Scotia tariff is expressed as a minimum sentence (requiring rigid application that can be ousted by exceptional circumstances) whereas the Alberta tariff is expressed as a mere starting point of calculation. Indeed the courts have described the process that should be followed after taking into account the starting point, "...the specific

sentence for the specific accused should then be adjusted on a balance of the compendium of aggravating and mitigating circumstances present in the case". As stated by the Alberta Court of Appeal in *R. v. Hessam* (1983), 43 A.R. 378, "...the end of this process is not uniform sentences, for that is impossible. The end is a uniform approach to sentencing".

These contrasting approaches to the tariff reflect disparate underlying objectives. In Nova Scotia the creation of a minimum sentence for robbery was based on the objective of general deterrence. In Alberta the tariff has developed more in response to the recognized need for equity (uniformity of approach).

A study of the extent to which trial court judges take into account appellate guidelines in arriving at their determination of an appropriate sentence revealed that it is still the exception for a trial court judge to cite and apply a range set by the Courts of Appeal.³

Cases are not consistent as to what the role of the trial court with regard to following Appeal Court decisions ought to be. Two disparate cases illustrate this point. In *R. v. Basha* (1978), 23 Nfld. & P.E.I.R. 310 (Nfld. Prov. Ct.) the trial judge maintained that in deciding on a fit and proper sentence, "...one must have regard to sentences being handed down by the Court of Appeal in this province and in other Canadian provinces, so that where possible a uniformity of sentencing is applied." The trial judge examined the cases and applied the range. The Court of Appeal overturned the judgment and said "What this court must consider on appeal is the appropriate range of sentencing, taking the crime, the circumstances surrounding it and the offender himself into consideration" (see (1979), 23 Nfld & P.E.I.R. 286 (Nfld. C.A.)). Hence, it is not surprising, in light of these judgments, that trial courts lack the impetus to discover the appropriate range (*Young, 1984*).

The second case presents the opposite view. In *R. v. Burnchall* (1980), 65 C.C.C. (2d) 490, the trial court judge rejected appellate guidelines as fettering his discretion and said that only Parliament has the power to specify a minimum sentence for an offence. The Court of Appeal overturned the decision of the trial judge, stating that the guideline only says that it would be an error in principle not to impose a custodial sentence for a particular offence (trafficking in narcotics), leaving undefined "exceptional circumstances" for individual cases.⁴

In the review of those judgments that do establish a range or "starting point" for sentences of imprisonment, the case law was also examined to establish whether Appeal Courts have also developed guidelines to assist sentencing judges in their analysis of mitigating and aggravating factors. In other words, is there guidance to judges as to when they might depart from the prescribed tariff?

The case law reveals that with the exception of the Alberta Court of Appeal, there has been little movement at the appellate level towards

developing clear and meaningful guidelines with respect to the operation of mitigating/aggravating circumstances.

There are two ways an appeal court can provide concrete guidance on these matters. First, through a statement of principle, in the judgment, outlining the specific effect of an aggravating/mitigating factor. Second, through an explicit articulation of the logical link between the factor(s) cited and the ultimate disposition (*Young, 1984*).

Although both forms of guidance are rare, the second appears even less frequently in reported judgments. In fact, many of the reported sentencing cases are so terse that analysis of how factors were used is impossible. A vast majority of appeal court decisions lists a catalogue of factors present in a case without classifying these factors as aggravating or mitigating. The court then throws the factors into a melting pot and, "...taking into account all the circumstances" arrives at a final disposition, without giving any indication of the weight attributed to the factor or the impact a particular factor had on the ultimate disposition.

Some judgments go beyond an "impressionistic approach" to state a general principle of general application. However, even these judgments usually just acknowledge that a certain factor can operate as aggravating or mitigating in certain circumstances (without reference to weight).

An examination of 700 cases in three provinces revealed that there were just over a dozen cases in which courts even attempted to outline principles that extended beyond the unique facts of the case. There is no apparent consensus on whether certain factors are aggravating or mitigating. When recurring factors were isolated to study consensus, not only were there discrepancies between appeal courts of different provinces, but also within the same court. Even if such disparate approaches are acceptable when it comes to questions of range or tariff, one might ask "...whether respect for the law can be nurtured if intoxication will mitigate in New Brunswick and not in Alberta" (*Young, 1985*).

Finally, the fact that those ranges that are created in appellate judgments take the form of a "starting point" has two important consequences. First, either explicitly or implicitly, "starting points" establish a minimum sentence of imprisonment to be imposed in similar cases. For a number of reasons that will be discussed in detail in Chapter 8, the Commission is opposed in principle to minimum sentences, whether in the form of a guideline range or a legislatively prescribed penalty. If the principle of restraint in the use of imprisonment is to be taken seriously, a guideline range cannot take the form of a minimum starting point. Imprisonment as a last resort requires that, for most criminal cases that the courts hear on a daily basis, "the starting point" must be a community sanction. Second, inherent in the notion of a "starting point" is that it does not prescribe an upper limit — or an "ending point". Any departure from the range therefore must be to impose a less onerous sanction than the prescribed years of imprisonment for that particular offence. *A*

guideline range should not prejudge the issue of which way to depart. In fact it is inconsistent with a policy of restraint to define a range in terms of the least amount of time that should be served in prison, with not even an upper limit to cap that range.

Hence, a careful review of the jurisprudence reveals that where Courts of Appeal have developed policy or guidelines for the determination of sentences, the guidelines reveal a policy of presumptive sentences of incarceration for most offences reviewed and set a corresponding minimum term of imprisonment. The logic appears to be that there can be too little punishment — but there cannot be too much.

5.4 Conclusion

In the past decade, Courts of Appeal in a few provinces have taken a more active role in developing sentencing policy through tariff judgments. Tariff sentencing in Canada is still at an incipient stage and although it may be too early to judge the extent to which it will become the rule rather than the exception for Courts of Appeal, one thing is clear: there are factual limitations that will prevent Courts of Appeal from ever providing the kind of guidance required to ensure that judges across Canada share a uniform approach to the determination of sentences. First, there is the very real and pressing consideration of the timeliness of reform. An integrated approach to a comprehensive set of sentencing reforms requires that the guidelines essential to that reform accompany the proposals when they are acted upon by Parliament. The timing is essential. The Commission's proposals for reform cannot wait for guidance to be developed by Courts of Appeal on a case by case basis over a long period of time. The guidance itself is an essential part of the reform proposed.

Second, since guidance is such an essential part of the integrated reform that will be proposed, the Commission cannot depend exclusively on Courts of Appeal, who in the past have never been required to provide this kind of guidance, to adopt the new role of policy-maker. A history of common law is a history of solving problems on a case by case basis. Courts of Appeal seldom have attempted to embark on a course of policy-making for a good reason: they must remain free to judge a new case on its own merits the following day.

Courts are primarily a reactive institution. They cannot initiate policy and must solve problems as they arise. Other policy-making bodies like Commissions are not hampered by this inherent constraint. They can make policy with a view to the future, not only in response to the past.

Within the current structure, Courts of Appeal perform an essential function in reviewing sentences imposed by trial courts. In the past they have performed their task with little guidance from Parliament. To expect that a uniform approach to sentencing can be developed with clarity and consistency by ten different courts is to over-simplify the complexity of the task of sentencing.

Endnotes

- ¹ A term often used to describe the role of Appeal Courts in establishing ranges or guidelines for sentencing.
- ² This is a question that the Commission gave priority to and to which it devoted considerable research resources. In addition to analysing five extensive studies of Canadian jurisprudence undertaken for the Commission on this topic (*Young, 1984, 1985*), the Commission referred to the literature (e.g., Ruby, 1980; Nadin-Davis 1982) and to references prepared by organizations such as the Reserach Facility of the Law Society of Upper Canada.
- ³ Alberta trial courts appear to adhere to appellate guidelines with greater frequency than any other province (Alberta also has a better reporting of Appeal Court decisions).
- ⁴ In another case the trial judge lamented that there were no guidelines as to what constitutes 'exceptional circumstances' and the Court of Appeal's response was '...if that means he wants exhaustive guidelines, I decline to accept the invitation.' (*R. v. Doherty* (1972), 9 C.C.C. (2d) 115).

Chapter 4

Public Knowledge of Sentencing

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Chapter 4

Public Knowledge of Sentencing

The Commission conducted several nation-wide polls to assess public knowledge of sentencing laws and practices in Canada. The results indicated substantial discrepancies between public knowledge and reality. This finding is important for several reasons. For instance, without public awareness of maximum penalties one must question how they can serve to deter potential offenders. Without knowing the reality of criminal activity in this country, the public cannot be expected to have confidence in the administration of justice. In order to understand opinion regarding sentencing it is necessary to determine the extent of public knowledge; in order to overcome deficiencies in public awareness one needs to know something about their sources of information. Members of the public rely almost exclusively upon the news media for information regarding sentencing. Accordingly, several content analyses of the news media were conducted. This Chapter will summarize some of the findings from opinion surveys and research upon the Canadian news media.

1. Knowledge of Penalties

When the average person thinks of sentencing he or she probably thinks first of penalties: statutory penalties and those handed down in the average cases. A good place to begin an examination of public awareness of sentencing is with the issue of maximum penalties.

1.1 Maximum Penalties

In theory at least¹, maximum penalties provide judges with an upper boundary within which they may evaluate particular cases. As well they can serve several purposes for the public. Maximum penalties can provide an indication of the relative seriousness of offences, a yardstick against which to evaluate sentences and an indication of the maximum penalty which they may face if they commit the offence.

But maximum penalties can inform only if the public are aware of their existence and their relative magnitudes. Research suggests that the public consistently under-estimates the severity of maximum penalties prescribed by the *Criminal Code*.

In one survey (Research #2), a representative sample of Canadians was asked to estimate the maximum penalties attached to a series of offences. Table 4.1 compares average public estimates with the maxima prescribed by the *Criminal Code*. The findings are quite clear.

Table 4.1

Public Estimates of Maximum Penalties^a

| <i>Offence (Criminal Code Maximum)</i> | <i>Average Public Estimate</i> |
|--|--------------------------------|
| 1. Robbery (Life) | 7 years |
| 2. Break and Enter home (Life) | 4 years |
| 3. Break and Enter business (14 years) | 4 years |
| 4. Theft over \$200 (10 years) | 4 years |
| 5. Assault (5 years) | 5 years |
| 6. Theft under \$200 (2 years) | 1 year |

^a Source: Research #2.

For all offences except theft under \$200, (this question was posed prior to the change from \$200 to \$1,000) the majority under-estimated the severity of the maximum penalty. For example, while the maximum penalty for robbery is life imprisonment, the average estimate by members of the public was seven years. Sixty percent estimated the maximum as under 10 years. Clearly then, the majority of people have little accurate idea of how severe sentences can be, and in this respect they are no different from citizens of other countries.²

Some might argue that people are unfamiliar with maximum penalties because they never read about them. The maximum penalty for most offences seldom appears in the news. Impaired driving is an exception. A great deal of publicity attended the recent government legislation raising to five years imprisonment the maximum penalty for impaired driving. When the public was asked what the new maximum penalty for this offence was, fully three-quarters chose "don't know". Of those who did venture a response only 4% were correct. So it is not simply a matter of the media conveying the information. Even when they do, the public appears to profit little in terms of increased knowledge.

1.2 Minimum Penalties

There are few minimum penalties prescribed by the *Criminal Code*. Recent concern about drinking drivers impelled Parliament to raise the minimum penalties for impaired driving. In the words of a government

publication, (Department of Justice, 1985) these amendments contain “severe penalties” that “are intended to stop impaired people from getting behind the wheel”. General deterrence in other words. These penalties can deter only if people are aware of them, but they are not. Despite the publicity surrounding the new legislation, and a large-scale effort by the Department of Justice to educate the public, people seem to have little idea of the new penalties. In August 1986, by which time one might have expected the public to have learned of these changes, the Commission asked respondents to a nation-wide survey to name an offence that carries a minimum penalty. Only one-quarter cited impaired driving. Most chose other offences that do not carry minimum penalties. (For example 29% thought manslaughter carried a minimum penalty). Whatever they do achieve, minimum penalties can hardly be expected to contribute to general deterrence if the public are largely unaware of their existence.

2. Sentencing Practice

2.1 Perception of Leniency

The most popular question on opinion polls dealing with criminal justice has concerned public opinion of sentencing practice. The question typically posed is the following: “In general, would you say that sentences handed down by the courts are too severe, about right or not severe enough?” Dissatisfaction with sentencing practice appears to have reached a peak in 1983, when 80% of respondents to a nation-wide poll expressed the view that sentences in general were too lenient (Doob and Roberts, 1983). The Canadian Sentencing Commission posed this question and found that dissatisfaction had declined. The percentage expressing the view that the courts are too lenient is now approximately 64%. The Commission posed several additional questions to determine the foundation for this opinion. Is it based upon accurate perceptions of sentencing trends?

2.2 Perceptions of Imprisonment Rates

If the public knows little about maximum and minimum penalties, does it have a better idea of actual sentencing practice? Apparently not. In one poll it was asked to estimate, for a series of offences, the percentage of offenders who were incarcerated. The estimates were then compared to recent data showing current practice (See Appendix A for a description of data-sources used by the Commission). Table 4.2 confirms trends revealed in earlier research:³ most people under-estimate the severity of sentencing. Consider, for example assault causing bodily harm. More than half the offenders convicted of this offence go to prison. Most members of public think that the proportion imprisoned is lower. So the courts are harsher than most people think. This is an important fact to bear in mind when evaluating public demands for harsher sentences. If people’s knowledge of sentencing was better, their opinion might be too.

Table 4.2

Public Estimates of Imprisonment Rates: Assault and Break and Enter^a

| | Assault Causing Bodily Harm (Actual Rate = 56%) | Break and Enter (Actual Rate = 64%) ^b |
|---|---|--|
| <i>Public Knowledge:</i> | | |
| Approximately Accurate | 17 | 21 |
| Sees system as more lenient ^c than it is | 70 | 68 |
| Sees system as harsher ^d than it is | 6 | 5 |
| Doesn't know | 7 | 6 |
| | <u>100%</u> | <u>100%</u> |

^a Source: Research #3

^b Dwelling house and business premise combined

^c Assault = 0 – 39%; Break and enter = 0 – 49%

^d Assault = 70% – 100%; Break and enter = 80% – 100%

3. Early Release

Sentences do not often make front-page news. Early release, however, is a different story. Discussion of the recent *Act to Amend the Parole Act and the Penitentiary Act* (S.C. 1986; c-42) dealing with the procedure whereby certain inmates may have their remission-based release withheld has been in the spotlight for some time now. Members of the public appear to have profited little from the debate. Public knowledge of early release mechanisms is poor. Although parole and mandatory supervision are quite distinct, most people are unable to distinguish the two. When they were given multiple choice questions 85% failed to correctly identify mandatory supervision; 66% failed to correctly identify parole⁴. The public knows offenders do not serve all of their sentences in prison, but it does not know much about the release programs which enable inmates to serve part of their sentences in the community.

The Commission asked several other questions regarding parole and the responses shed further light upon public dissatisfaction with the sentencing process. Several trends were apparent. First, the majority of people overestimate the percentage of offenders released on parole. While the release parole rate is currently less than 33% (Hann and Harman, 1986), 50% of the public estimated between 60 – 100% of offenders are released on parole⁵. It is also clear that people perceive parole boards as becoming more lenient towards offenders; this was the view held by two-thirds of respondents. Reality tells a different story: release rates have remained relatively stable for the last five years (Hann and Harman, 1986; Figure 2-10).

3.1 Violations of Release Conditions

What does the public believe happens to the average inmate who obtains early release? Once again its view contains more gloom than truth. For instance, approximately 25% of full parole releases are revoked for one reason or another. Over 40% of the public estimate a revocation rate of between 30% and 100%.

Moreover, these estimates reflect the view that most revocations are the result of fresh convictions, whereas, in fact, most are for violations of release conditions (Harman and Hann, 1986).

3.2 Recidivism Rates

One reason society at large has a negative opinion of sentencing and early release is that it over-estimates the number of offenders who are re-convicted of further crimes. This is true both for those inmates who obtain early release and for offenders in general, whether they committed crimes against persons or property (Roberts and White, 1986). In 1983, respondents to a nation-wide survey were asked to estimate the percentage of first-time offenders that would be re-convicted of another offence within five years. A glance at Table 4.3 tells the story. The public believes that a far greater percentage of offenders recidivate than is, in fact, the case.

Table 4.3
Public Estimates of Recidivism Rates^a of First Offenders

| <i>Public Knowledge</i> | <i>Offence Category</i> | |
|----------------------------|---------------------------|-------------------------|
| | <i>Against the Person</i> | <i>Against Property</i> |
| Accurate ^b | 12 | 21 |
| Over-estimate (30% – 100%) | 79 | 62 |
| Under-estimate | 2 | 9 |
| Don't know | <u>7</u> | <u>7</u> |
| | <u>100%</u> | <u>100%</u> |

^a Source: Doob and Roberts (1983)

^b Correct estimates of percentage re-offending: offences against the person = 17%; offences against property = 27% (Source: Law Reform Commission of Canada, 1976).

Comparable findings emerge when similar questions were posed regarding offenders on early release. Members of the public were asked to estimate the percentage of parolees convicted of offences of violence before their period of parole had elapsed. Table 4.4 shows the unrealistically negative views of the threat to society posed by offenders who serve part of their term of imprisonment in the community.

Table 4.4

Public Estimates of Percentage of Parolees Re-convicted of Offences Before Period of Parole has Elapsed^a

| <i>Public Knowledge</i> | <i>Offence Category</i> | |
|----------------------------------|---------------------------|-------------------------|
| | <i>Against the Person</i> | <i>Against Property</i> |
| Accurate ^b (1-9%) | 8 | 3 |
| Small over-estimate (10-29%) | 25 | 19 |
| Large over-estimate (30-100%) | 56 | 66 |
| Don't know/not stated | <u>11</u> | <u>12</u> |
| | <u>100%</u> | <u>100%</u> |

^a Source: Research #1

^b Correct estimate: offence against the person 2%; offences against property 9% (Source: Solicitor General Canada, 1981)

These results suggest that the Canadian public might well look more favourably upon sentencing and early release mechanisms such as earned remission, if it had more accurate views of the proportion of offenders who commit further offences. In fact, objections to early release are founded upon the issue of re-offending. Members of the public were asked for the strongest argument against parole. Over half mentioned recidivism of parolees. No other argument came close. In this context it is worth noting that the public has an unduly pessimistic view of the criminal justice system in general. For example, while the crime rate in the U.S. exceeds that of Canada by a considerable margin, many Canadians believe the two countries to have similar rates. The issue of public knowledge of recidivism rates should be seen within this broader context.

4. When is the Public Accurate?

The public is not always inaccurate. On some of the questions the Commission posed, they were fairly knowledgeable. For instance, almost two-thirds of respondents correctly identified plea bargaining. Although they had difficulty understanding a concurrent prison term, over two-thirds understood what a consecutive term meant. As well, there was some familiarity with at least one community sanction: almost three-quarters correctly identified a community service order. It is not the case then that through information overload, people cannot learn about sentencing. If the sentencing process were more realistic and comprehensible – as it would be under the Commission's proposals – public understanding would be considerably enhanced.

5. Sentencing and the News Media

Generally, knowledge of sentencing is poor and systematically biased: Canadians believe crime rates to be higher and sentences to be lighter than they are. These beliefs are widespread. Moreover, when the average person on the street is asked a question about sentencing, he or she will typically answer without hesitation. People are quite confident of their views of the sentencing of offenders. How have these misconceptions arisen?

Part of the answer can be found by examining the news media. The news media is not the public's only source of information. We learn about the justice system from many sources: friends and acquaintances; government publications, personal experience – all contribute to our knowledge of crime and official attempts to control crime. But it is upon the news media that people rely most heavily. In fact, when people were asked where they got their information relating to sentencing, fully 95% cited the news media (Research #2). To understand public knowledge of and attitudes towards sentencing we need to know how the media deals with sentencing news. With this in mind the Commission's research activities included several analyses of Canadian news media and interviews with news editors and journalists (*Rosenfeld, 1986; Tremblay, 1986*).

One of these analyses examined all sentencing stories which appeared in a sample of nine major Canadian English-language newspapers⁶ (Research #4). An analysis was also performed upon a sample of French-language newspapers (*Tremblay, 1986*). Although similar results emerged, for the sake of brevity only data from the English language sample will be discussed in this chapter. Previous research has established that people turn most often to newspapers for information about criminal justice issues. For example, van Dijk (1978) found that of those individuals who had discussed crime recently (and almost all respondents had), 66% heard of the topic they discussed from the paper. This is in comparison to 13% who cited the radio as their source and a further 13% who cited another person. It seems likely then that when people talk about sentencing issues – or a particular sentence – they discuss material from their newspapers. In all, over 800 stories which dealt with sentencing (or contained a sentence from a Canadian court) were studied. The following portrait of sentencing emerged.

5.1 Sentencing Stories in Major Canadian Newspapers

Perhaps the most outstanding feature of sentencing stories in newspapers is that over half of them deal with offences involving violence. Looking more closely, one can see that over one-quarter deal with some form of homicide (i.e. first and second degree murder; manslaughter; criminal negligence causing death). These figures confirm expectations derived from other research: relative to their actual frequency, crimes involving violence are highly over-represented in the news media. The public then is forced to build its view of

sentencing on a data-base which does not reflect reality, where fewer than 6% of crimes involve violence (Solicitor General of Canada, 1984)⁷. Small wonder that most people, when asked their opinion of sentencing in general, have violent offenders in mind (Brillon, Guérin and Lamarche, 1984). So most of the sentences reported by the newspapers are handed down to offenders convicted of crimes of violence. The next step in this analysis of the media examined the kinds of sentences which appeared in this sample of newspapers.

5.2 Sentences Reported

Here once again, reality and the media's representation of reality diverge. Studies of sentencing practice show that fines are the most frequent disposition (Hann, Moyer, Billingsley and Canfield, 1983; *Verdun-Jones and Mitchell-Banks, 1986*). The sentences reported by the newspapers reflect a different picture. Sentences of imprisonment constitute the overwhelming majority of dispositions reported by the newspapers, as can be seen in Table 4.5.

Table 4.5
Sentences Reported in a Sample of Canadian Newspapers (1984-1985)^a

| <i>Disposition</i> | <i>Percentage of Sentences Reported</i> |
|-----------------------|---|
| Imprisonment | 70 |
| Probation | 12 |
| Fine | 9 |
| Conditional Discharge | 1 |
| Other | 8 |
| | <u>100%</u> |

^a Source: Research #4

Fines – the disposition most frequently imposed – here account for fewer than 10% of reported sentences.⁸ The alternatives to incarceration receive little attention from newspapers. The reason for the preponderance of sentences of incarceration should be clear: the newspapers generally select the most serious offences, and usually the most serious cases of those offences.

Beyond asking what kinds of sentences are reported, another area of concern is the extent to which newspapers publish information pertaining to the legal reasoning behind a sentence. One needs no systematic analysis to know that newspapers are unlikely to report run-of-the-mill cases; clearly they reserve publication for those cases – and sentences – that are in some way exceptional. It is in these instances that one might expect to encounter explicit reasons from judges to account for their sentences. If there are more reasons, then newspaper readers are unlikely to know: in 70% of the stories examined,

no reason for sentence was given. Only a single reason was provided for a further 20% (Research #4). This appears to be an area in which newspapers might provide greater depth of analysis.

5.3 Maximum Penalties, Minimum Penalties and Current Practice

When reading a sentence – say, five years for manslaughter – the reader may well ask what the offender might have received if the maximum penalty had been imposed. To find an answer he or she would have to turn to the *Criminal Code*: information about statutory penalties was present in fewer than 1% of the stories. There seems to be a discrepancy between what reporters write and what they say they write. A Commission study of reporting practice and policy (Rosenfeld, 1986) found that a majority of English-language reporters claimed they made reference to the maximum sentence of the offence they were covering. Similar results emerged from an analysis of French-language publications (Tremblay, 1986). The absence of information about maximum penalties may explain why the public's estimates of these maxima are so far from reality (see Table 4.1, p. 90). Information regarding sentencing practice – or what in average circumstances an offender might get – was even less likely to be reported. The same is true for the few minimum penalties prescribed by the *Criminal Code*. These omissions are perhaps the most serious by the news media. How, except by reference to minima, maxima and current practice, is a member of the public to assess whether a given sentence is appropriate? Finally, a word about why certain cases and not others get reported. This is a critical research question, one that can be answered by data from two sources: (a) the profile of offences reported, and (b) interviews with individuals responsible for writing and editing newspapers. Both sources converge upon the same answer. The major determinant of whether a sentence appears in print seems to be the seriousness of the offence.

It has been noted already that offences of violence, which are usually rated as the most serious offences⁹ are more likely to be reported: relative to their actual frequency they are over-represented in the pages of newspapers. A more detailed examination (Research #4) of a particular offence (manslaughter) suggested that in addition to selecting the most serious offences, newspapers report the most serious instances of those offences.

Another source of information was an examination of editorial policy and practice (Rosenfeld, 1986). A researcher with a background in both law and journalism interviewed reporters and editors from several newspapers, radio and television stations. While there appeared to be variance across media in terms of *who* made the decision to report a particular case (the court reporter or the editorial staff), there appeared to be little variation as to the criteria for selection. It was almost always the seriousness of the offence, followed by the prominence of the offender (see also Tremblay, 1986).

5.4 Newsworthiness of Sentences

Even a year's worth of stories does not generate a sufficient number of any particular offence to compare sentences in the media with sentencing in the courts. It is clear though that it is generally the unusual cases that are reported. Newsworthiness determines whether the public reads about a sentencing hearing, and in turn this means, in most cases, sentences that are perceived to be sufficiently "lenient" to make them newsworthy. Interviews with editors and reporters confirmed the impression – derived from reading the actual stories – that excessively lenient sentences were more likely to be reported than excessively harsh sentences.¹⁰ However, there are exceptions. For example, the *Ottawa Citizen* recently reported the sentence of three months imprisonment imposed upon an offender for the theft of a small sum of money.¹¹

One last question. What does the public think of the news media's coverage of sentencing? The following question was posed: "Is the news media, in your view, providing the public with adequate information about sentencing?". Of all respondents, 8% chose "don't know". Of those with an opinion, 61% said "no" (Research #3).

6. Conclusions

Public education is neither the sole nor the primary aim of the news media. It would be overly simplistic as well as unfair to blame the newspapers for public misperceptions of sentences and the sentencing process. There are many reasons why the public holds the view it does¹² and imperfect coverage of sentencing hearings is but one. However, the analyses reported here do suggest that with little additional effort newspapers might present a more informative picture to their readers. In terms of public reactions to individual cases, the public might respond quite differently if it had reference points such as the maximum penalty and the average sentence. The difficulties (at the present time) of obtaining the latter may explain their absence, but there seems little reason why reporters cannot furnish their readers with the maximum penalties. Also, like the public, news reporters have good reason – under the current system – to be confused by the sentencing process. Providing the media with systematic, comprehensive information is as important as educating the public. The reforms proposed by this Commission would make the process and practice of sentencing more comprehensible to reporters and the general public alike.

Most Canadians believe sentences to be too lenient. The research summarized in this chapter suggests that this view of sentencing is partly a result of inadequate information about individual cases, general trends, and the process itself. Some of these misperceptions are summarized in Table 4.6. It is hard to say by how much, but public views of sentencing would surely improve if these misperceptions were dispelled. The Commission urges the various media to promote understanding of sentencing by providing more complete information in their reporting of cases.

Table 4.6**Summary of Public Misperceptions Related to Sentencing^a**

| <i>Topic</i> | <i>Reality</i> | <i>Public View</i> |
|---|--|---|
| 1. Maximum Penalties: Example: Break and enter ^b | Public under-estimates severity Life Imprisonment | 4 years |
| 2. Sentencing Trends: Example: Break and enter ^c | Public under-estimates punitiveness of courts Over 50% get a sentence of imprisonment | Fewer than 40% get a sentence of imprisonment |
| 3. Early Release Rates: Example: Parole release rates | Public over-estimates percentage obtaining early release 30% of all inmates | Most people estimate over 60% |
| 4. Early Release Rates: | Public over-estimates amount of crime by people obtaining early release Release rates have not changed much ^d | More offenders being released now |
| 5. Parole Recidivism: | Public over-estimates amount of crime by people obtaining early release About 5% of parolees re-offend while on parole ^e | About 50% of parolees re-offend |
| 6. Crime Rates: Example: Violent Crime | Public over-estimates amount of violent crime 6% of total reported crime ^f involves violence | 3/4 of public estimate 30%-100% involves violence |

Table 4.6 (Cont'd)

Summary of Public Misperceptions Related to Sentencing^a

| <i>Topic</i> | <i>Reality</i> | <i>Public View</i> |
|---|---|-----------------------------------|
| 7. Homicide Rates: | Public perceives an increase since abolition of death penalty | |
| Example: Homicide rates since abolition of capital punishment | No change in rates ^g | Rates have increased ^h |

Notes:

^a All research by Canadian Sentencing Commission except where noted.

^b Private dwelling; business premise carries 14 years.

^c Source: FPS – CPIC

^d That is, the release rate remained between 28 and 34% in the period 1973/74 – 1983/84 (Harman and Hann, 1986).

^e Source: Solicitor General Study on Conditional Release (1981).

^f Source: Selected trends in Canadian Criminal Justice (1984).

^g Source: Doob and Roberts (1982).

^h Source: Doob and Roberts (1982).

Endnotes

- ¹ In practice, as this report demonstrates (see Chapter 9), the discrepancy between statutory maxima and sentencing practice suggests that statutory maxima provide little guidance for determination of sentences.
- ² A survey of U.S. residents (Assembly Committee on Criminal Procedure, 1975) reported that between 21% and 49% (depending upon the offence) of respondents were unable to even hazard a guess as to the maximum penalty for a series of common offences. The process by which the public arrives at its estimates sheds light upon its views of the offences. Presumably it infers the maximum from its view of seriousness of the offence. Thus, breaking and entering a business does not strike members of the public as an example of one of the most serious offences in the *Code*. Accordingly, they assume it does not carry one of the higher maxima: they estimate on average four years. This reflects (a) a strong sense that the punishment should be proportional to the seriousness of the crime, and (b) an unjustified confidence in the extent to which current maxima reflect the seriousness of offences.
- ³ In 1982 Doob and Roberts conducted similar work using slightly different questions and offences. The pattern of results was largely the same.
- ⁴ There were four alternatives for these questions. Correct performance on the basis of chance alone would therefore be 25%. The definition of mandatory supervision was included in the alternatives to the parole question; 33% of the respondents chose this over the correct definition of parole.
- ⁵ Similar – but more extreme – results were found in 1982: Doob and Roberts posed a similar question to respondents and found that 65% estimated the parole release rate was between 60% and 100%.
- ⁶ The period was July 1, 1984 to June 30, 1985. The newspapers were: Toronto Star, Globe and Mail, Winnipeg Free Press, Calgary Herald, Vancouver Sun, Halifax Chronicle, Edmonton Journal, Montreal Gazette and the Ottawa Citizen (See Research #4).
- ⁷ Recent occurrence statistics reveal that 5.7% of reported offences involved violence (Solicitor General Canada, 1984; 4). Since other types of crime (e.g. property offences) are less likely to be reported to the police, this figure is a high estimate of the percentage of total offences committed which involved violence.
- ⁸ A similar but less extreme pattern of results emerges from a content analysis conducted in the United States. Graber (1980) reports that prison accounted for 35% of sentences appearing in the press; fines accounted for a further 7%.
- ⁹ This is apparent from several surveys that have asked members of the public, as well as criminal justice professionals, to rank-order offences in terms of their relative seriousness. Offences against the person tend to be rated as the most serious, regardless of whether the respondents are members of the public or justice professionals (see, for example, Rossi, Waite, Bose and Berk, 1974).
- ¹⁰ In fact, some reporters admitted including the maximum penalty in order that the sentence imposed might appear more lenient.
- ¹¹ Ottawa Citizen, July 30, 1986.
- ¹² For instance, research in psychology has shown that people tend to generalize from single instances. Reading about a single lenient sentence often leads people to regard the entire sentencing process as being unduly “easy” on offenders. This is not to disparage members of the public; professionals working with statistics on a daily basis are also prone to such errors of inference. (See Nisbett and Ross, 1980, for further details of research on this topic).

Chapter 5

The Nature of Sentencing

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Chapter 5

The Nature of Sentencing

1. Introduction

In this chapter and the next, the Commission intends to present its theory of sentencing. At the end of Chapter 6, the Commission formulates a *Declaration of Purpose and Principles of Sentencing* and recommends its adoption by Parliament and incorporation in the *Criminal Code*. The *Declaration* articulates a sentencing rationale, which consists of a definition of sentencing and a statement of its goal and principles. In presenting its theory of sentencing, the Commission does not pretend to produce an academic treatise on all, or even most, aspects of sentencing. The aim of these two chapters on theory is to provide the main considerations which led the Commission to propose its recommended *Declaration of Purpose and Principles of Sentencing* and which support its position on the issues required to be addressed by its terms of reference.

This chapter presents an analysis of the nature of the sentencing process. While there is no denying that sentencing is a punitive process, the basic argument developed in this chapter challenges the current *identification* of sentences with punishment. The next chapter discusses the overall purpose and principles of sentencing and proposes an alternative to the prevailing views regarding its specific purpose.

1.1 Thinking about Punishment and Related Issues

Before reflecting on the nature of sentencing, a word must be said about the kind of concepts that are used to articulate a sentencing theory. Penology derives part of its name from the latin word “*poena*”, which means punishment. Hence, the notion of punishment is a central one; it is also complex and it can serve to illustrate some of the difficulties involved in the formulation of a sentencing theory.

Like a significant number of concepts related to sentencing, punishment appears to change its meaning depending upon the context in which it is used. For example, one of the earliest justifications for punishment is the oft-quoted

maxim: "An eye for an eye and a tooth for a tooth". According to this ancient saying, a victim can claim from an aggressor *as much as* the physical harm which he or she has suffered, but *no more*. Interestingly enough, a different kind of principle seems to govern the imposition of punishment in the context of property offences. If an offender has stolen an object (e.g., a television set) and is merely ordered by the court to return it to its lawful owner, most people tend to believe that the offender has *not yet* received any real punishment. The contrast between these two situations is rather striking. With regard to violent offences against persons, justice appears to command that the punishment be no more than *equal* to the amount of physical harm which has been inflicted. With regard to offences against property, imposing punishment would imply exacting from the offender a *premium* which is greater than the mere restitution of the lost or damaged property. In other words, punishing property offenders begins where punishing violent offenders should end.

Let us discuss briefly another example. If a twelve year old child comes home in a state of drunkenness, his or her parents may decide that the child should be punished in order to prevent the repetition of such misbehaviour. However, if responsible parents find evidence that their child is using heroin, they will normally not deal with this problem by punishing their child. Punishment appears to be an inadequate measure in such a situation and the parents will seek professional help. This example shows how different the use of punishment is in the context of the family and in the context of the criminal justice system. Within the family, punishment is only applied in the case of petty misbehaviour. When responsible parents believe that their child is really in trouble, they resort to means other than punishing him or her. To the contrary, many assume that under the criminal law, punishment is an adequate way of dealing with all offences and the more serious the offence, the more severe the punishment should be.

One last example. Criminal procedure and rules of evidence rest to a large extent on the assumption that there is greater injustice in punishing the innocent than in failing to punish the guilty. One consequence of this assumption is the frustrations of victims of crime who believe that the criminal law is being lenient toward offenders, when it is in fact being stringent on the level of proof which must be produced in order to obtain a conviction.

It may then be asked why punishment has a different significance when imposed in the context of violent offences against persons and when imposed for property offences. It may also be wondered why punishment is believed to be a relevant answer to most, if not all, criminal offences, when it is viewed as a limited means to control misbehaviour within the family. Finally, why is the criminal law more sensitive to the rights of the innocent wrongly accused than to the plight of the victims of crime? There are no definitive answers to these questions, because they reach into too many directions at the same time. However, the point which we have been trying to make in discussing the previous examples goes deeper than this obvious conclusion.

One of the most frequently alleged causes of sentencing disparity is the apparent lack of a commonly shared theory or philosophy of sentencing. With regard to this crucial issue, the point that we are attempting to make is the following: even if all judges agreed on one theory of sentencing, this would not be enough to solve the problem of sentencing disparity, because the concepts used to articulate such a theory lend themselves to different interpretations. Additional guidance must be provided.

The relative ambivalence of the concepts of penology does not imply that sentencing is impervious to reason and that all penal arguments are equivocal. It means that reasonableness in theorizing about sentencing begins with a recognition that sentencing issues have their own brand of complexity and that they cannot be resolved by the forcible application of a few rigid formulas and simple dictums. A theory of sentencing in itself cannot be a blueprint for what would be the equivalent of a sentencing “technology”. A sentencing policy which takes into account the limits of a sentencing theory, as they have been outlined above, cannot afford to be dogmatic and must be characterized by its flexibility and its adaptability to change. This is a point that will be explored in greater detail in this chapter and the next one.

1.2 Defining Sentencing

Most legislators and legal scholars take for granted that we know what sentencing is. They either do not define it at all or they provide a definition that tells us what sentencing ought to be rather than what it actually is. Subsection 2(10) of the Criminal Law Reform Act, 1984 (Bill C-19) defined the word “sentence” by enumerating all legal sanctions available to the sentencing judge. While this was necessary to provide a working definition for the purposes of the Bill, it did not elucidate the meaning of the term; it only provided examples of its use. Given that the real nature of a sentence was not explained in the bill, the process of sentencing itself would have remained undefined.

The Law Reform Commission of Canada has attempted to formulate a definition of sentencing:¹

Sentencing is used to refer to that process in which the court or officials, having inquired into an alleged offence, give a reasoned statement making clear what values are at stake and what is involved in the offence. As the sentence is carried out, it may be necessary from time to time, as in probation, to change or amend conditions relating to the sentence.

This definition is essentially normative and refers to what sentencing should be while assuming that we know what it is.

Although it cannot be denied that the word “sentencing” is generally understood, it seems desirable to articulate an explicit definition of sentencing. The purpose of this endeavour is to draw a distinction between the notion of punishing and the notion of sentencing, which are all too often confused one for

the other. When speaking about sentencing, there is a tendency to err in one of two directions. The first mistake is usually due to naïveté and goodwill. It consists of using language to conceal the fact that sentencing is a coercive process and that it imposes on someone a measure which that person would shun, if given a choice. This excess has often been denounced in the past, when the use of incarceration solely for rehabilitative purposes became a focus for criticism. There is however a second kind of error, which has not yet drawn as much critical notice and which is due to over-reaction against the former naïveté. This error stems from laying exclusive emphasis on the starkest and most punitive aspects of sentencing. As much as it was stressed at one time that an offender was sentenced for his or her own good, it is now emphasized that sentencing results in the infliction of deserved harm on a culprit. The problem with this attitude is, as we shall see, that it tends to degenerate into a self-fulfilling prophecy. Stressing exclusively the most punitive aspects of sentencing invariably results in increasing the overall severity of the process and consequently making change more difficult.

This chapter is divided into four parts. First, the current identification of sentencing with the imposition of punishment is discussed. Second, a contrast between sentencing and punishing is articulated. This contrast is followed by a proposed definition of sentencing. Finally, some additional features of the sentencing process are described.

2. Sentencing and Punishing: An Implicit Identification

Scholars and law-makers are justified in assuming that we know what sentencing is only if we agree with their basic premise. This premise, seldom explicitly stated, is that sentencing and punishing are equivalent notions. The working definition of sentencing then becomes the imposition of punishment. It is a remarkable feature of the literature on sentencing that under the heading “the aims of sentencing”, most authors actually discuss the traditional goals of *punishment*.²

It would be difficult to find a more striking illustration of the pervasiveness of the compulsion to fuse the notions of sentencing and of punishing than the official Canadian translation of the word “sentence” in French. Although the word “sentence” exists in the French language, and has the same meaning as the English word “sentence”, the French equivalent for “sentence”, now used in Canadian legislation and in Canadian official reports and documents, is the word “peine” (punishment)³. This translation is perfectly consistent with an important statement made in *The Criminal Law in Canadian Society*:

First, the criminal law, for all the efforts and rhetoric expended over the past century, is primarily a punitive institution at root. Certainly the sanctions it metes out – whether justified in the name of treatment, rehabilitation, denunciation, deterrence, incapacitation, or whatever – are and always have been perceived as punitive by almost all of those to whom they are applied. So, whether the question of the purpose of the criminal law is approached from a retributive or a utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive. (p.39)

One thing should be made absolutely clear in order to avoid misunderstandings to which we have already referred as due to naiveté. Any attempt to show that the criminal law is *not* a punitive institution would be abortive and ultimately irresponsible. It would so contradict the public perception of the thrust of the criminal justice system, that it would be met by outrage and could only exacerbate punitive feelings. Here, our sole purpose is to examine if there is a foundation for assumptions that sentencing and punishing are identical processes and that their aims are indistinguishable. It is more than a question of mere semantics. The history of Kingston Penitentiary, as it was related in Chapter 2, shows that harsh language begets even harsher practice.

Before contrasting sentencing with punishing, two general points ought to be made.

2.1 Problems with the Definition of Punishment

If most authors assume that we all know what sentencing is, they also appear to believe that the notion of punishment is self-evident. Actually, one presumed advantage of identifying sentences with punishment is that whatever obscurity which may be attached to the notion of sentencing is dispelled by the clarity of the notion of punishing. In truth, it is almost impossible to avoid circularity in defining punishment, the notions of crime and punishment being involved in both of their respective definitions. The problems generally associated with the definition of punishment are particularly acute with regard to the definition of *legal* punishment.

What, it may be asked, is the nature of punishment? One of the best answers is provided by a legal scholar: punishment is the imposition of severe deprivation on a person guilty of wrongdoing.⁴ However, it is not all persons guilty of some form of wrongdoing who are liable to be punished by the criminal law. For instance, betrayal is generally held to violate very fundamental human and social values. However, it is only the betrayal of one's country, as opposed to the betrayal of a spouse, a friend, an associate or a team, which is now a criminal offence. The definition of legal punishment must be narrowed down to the infliction of severe deprivation on a person found guilty of a crime. But how is one to define a criminal offence? The usual answer is that a criminal offence is that kind of wrongdoing which is punishable by law.⁵ The definition of punishment becomes circular and punishment is defined as the imposition of severe deprivation for a punishable wrongdoing.

If then, it is argued that the benefit of identifying sentencing with punishing is that this procedure sheds light on the nature of sentencing, it must be acknowledged that this benefit is at best limited, which is not to say that the notion of punishment is beyond comprehension. Actually, for the purposes of contrasting sentencing with punishing, the concept of punishment shall be understood according to the previously-quoted definition: punishment is the imposition of *severe* deprivation on a person found guilty of wrongdoing. This definition stresses that legal punishment is associated with a certain harshness and is not to be confused with a mere "slap on the wrist".

2.2 The Criminal Law and the Sentencing Process

It should be noted that the excerpt from *The Criminal Law in Canadian Society* previously quoted stresses the character of the criminal law as a whole. The sentencing process is but one part of the criminal justice system and it is questionable whether the sentencing process can be made accountable for the punitive character of the whole system.

As sentencing is viewed as the “climax of the criminal justice process” (Canada, Sentencing, 1984:1), there is a tendency to trace back to sentences any punitive effect which may be produced by the criminal justice system. It is argued for example, that an absolute discharge is punishment because the offender went through the painful ordeal of being arrested and found guilty (not to mention that according to the present state of the law, he or she bears the stigma of having a criminal record). This argument is specious, however, for it fails to distinguish between a police arrest, adjudication of guilt or innocence and sentencing. The failure to make these distinctions leads to holding sentencing accountable for all punishment stemming from the criminal law. That this is a mistake can be illustrated by the fact that even being found not guilty in court can be seen as a punitive process. In some cases, the mere fact of having been charged is sometimes stigma enough to ruin a career, whatever the outcome of the trial and even where the charge is subsequently withdrawn. In other cases, a jury might be inclined to feel that the accused has been treated to enough pain and pronounce a verdict of not guilty that is unwarranted in law or unsupported by evidence. In both instances again, the accused will bear the stigma of having been cleared by the court under circumstances which appear objectionable. Surely when a person is found not guilty, the pain that has been otherwise visited upon him or her cannot be attributed to the sentence, because *no sentence* is imposed following a verdict of not guilty. The same claim could be made for an absolute discharge: whatever punishment may have preceded it, as a sentencing disposition *per se* it does not involve punishment. Some victims of crime have learned that any brush with the criminal law can be painful. However, *one cannot argue from this very general feature of the criminal law, that the sentencing process is thereby exclusively punitive.*

One final point: the punishment that is purposefully meted out to offenders by the criminal justice system must be carefully distinguished from the unintended harshness of its operation. The criminal law does not aim to make the recognition of innocence a painful ordeal; that it is occasionally so is a by-product of a system that may, in fact, seem to be uncaring but does not intend to be so. If it is improper to blame the sentencing process for all the unintended punishment generated by the criminal law, it is sophistry to hold this process accountable for the overall brutality of the whole penal system.

3. Sentencing and Punishing: A Contrast

Two arguments favouring the identification of sentencing with punishing have been rebutted. However, it is not enough to merely refute these general arguments. Specific differences between sentencing and punishing must now be discussed.

3.1 Sentencing as a Judicial Statement

The word “sentence” comes from the Latin “*sententia*”, which means opinion or the expression of an opinion. Therein lies one fundamental difference between a punishment and a sentence. The former is the actual infliction of a deprivation, whereas the latter is a *statement* ordering the imposition of a sanction and determining what it should be. Even granting that to be the object of a sentencing pronouncement is in itself a stigma, the failure to draw the difference between the sentence as a judicial statement and the sentence as an applied sanction has several undesirable consequences.

First, the possibility that the sentence may be distorted by its correctional application appears to be ruled out in principle. The whole weight of corrections suddenly evaporates into mythical coincidence between the sentence as determined by the judge and the sentence as it is administered in practice. This myth is contradicted by widespread feelings among judges that there is a large discrepancy between the sentence as it is imposed and as it is carried out.

More importantly, even assuming that sentencing is a punitive process, it is above all the subordination of punishment to fundamental justice. There is between sentence and punishment the same distance as exists between the rule of law and practices such as vigilante justice.

Finally, as a judicial pronouncement, sentencing may aim to be well-reasoned, explicit and public. These goals are proper to judgments and unrelated to punishment as such. It must be stressed in this regard that the traditional utilitarian goals of the sentencing process – deterrence, incapacitation and rehabilitation – do not bear in themselves any specific relationship to justice and can be achieved in unjust ways.⁶

3.2 Sentencing as Protection Against Unofficial Retaliation

It can be argued that equating sentences with punishment is too restrictive ever to allow the sentencing process to take into account some of its traditions. One of these traditions, named Montero’s aim (after the Spanish jurist who articulated it in 1916), dictates that the penal system ought “to protect offenders and suspected offenders against unofficial retaliation” (as restated by Nigel Walker).⁷ This tradition has always commanded such unanimous support that legal theorists scarcely feel the need to mention it. However, in a recent judgment of the Supreme Court of Canada, Madam Justice Wilson referred to this goal in her statement of the objectives of legal sanctions.⁸ It is actually the first one that she mentions.

It may be that this aim will take renewed significance with the recent growth of private vigilantism. It is obvious that the imposition of criminal sanctions on offenders has a crucial part to play in achieving Montero’s aim. However, it is equally evident that a bare equation between sentencing and

punishing is much too rudimentary to satisfy the implications of Montero's aim, the main one being that there should be a significant difference between official justice and private retaliation. The concept of doing justice is more elaborate than the bald notion of inflicting punishment and, in any event, preferable. It implies a respect for moral principles and personal rights which can be ignored by naked retaliation. It also implies a balancing of the interests of justice independent of the desires of individuals and private pressure groups.

3.3 The Context of the Rediscovery of Punishment

Assertions about the intrinsically punitive character of the criminal justice system should be put in context. This context was provided by an attack upon rehabilitation as it was practiced in the United States. Several influential books such as *Struggle for Justice*, *Fair and Certain Punishment* and *Doing Justice* were published in that country during the 1970s, denouncing the "crime of treatment" and advocating "just deserts". It was then felt that the rhetoric of providing assistance to inmates in order to facilitate their rehabilitation was in fact no more than an excuse for punishing them more harshly. It was alleged that custodial sentences were noticeably longer in states like California that more rigorously applied the rehabilitative model of corrections and used indeterminate sentences.

It was in strong reaction to the perceived hypocrisy of these claims that some penal reformers resolved to state in the most unequivocal terms that exacting punishment was the core of the criminal law. The words of Willard Gaylin and David Rothman, who were both members of the Committee for the Study of Incarceration that published its oft-quoted report under the title *Doing Justice*, bear witness to this kind of reaction. This study committee was sponsored by the Field Foundation and by the New World Foundation. In their preface to the report, Gaylin and Rothman write:⁹

Certain things are simply wrong and ought to be punished. And this we do believe. In so stating our position, we then become free to set reasonable limits to the extent of punishment. When we honestly face the fact that our purpose is retributive, we may, with a re-found compassion and a renewed humanity, limit the degree of retribution we will exact. And still we are not happy. Our solution is one of despair, not hope.

Although not all proponents of the just deserts model agree with the last sentence of this quote, Gaylin and Rothman's pessimism is at least partly justified. The discrediting of the rehabilitative use of incarceration produced a vacuum among the goals which may be ascribed to the penal system. This vacuum was filled by a rediscovery of retribution and deterrence, as they were formulated by eighteenth century thinkers like Immanuel Kant and Cesare Beccaria. Therein lies another one of our objections to a definition of sentencing which equates it with punishing. It permanently entrenches what was a reaction against rehabilitation. This reaction occurred in particular circumstances and was followed by a retreat into eighteenth century penal ideology.

The fact that the idea was born so long ago does not make it inherently objectionable. However, Canadian penal history reveals that it was precisely the goals of retribution and deterrence which were invoked to establish Kingston Penitentiary. The conditions of life prevailing in this institution were so repressive that they were subsequently denounced by several commissions of inquiry. What guarantee have we got that a reactivation of retribution and deterrence will foster restraint in the use of punishment, rather than the excess of yesteryear? This question must now be addressed.

3.4 Punishment and Restraint

The commitment of just deserts theorists to restraint in the use of incarceration cannot be debated. The preface of *Doing Justice* is in this regard exemplary:¹⁰

And central to our conception, essential to its balance, is a commitment to the most stringent limits on incarceration. It would be better to ignore the recommendations of the Committee entirely than to accept any part of them without that focus on incarceration about which all its other arguments pivot.

In the same way, the submission presented to the Commission on behalf of the Law Reform Commission of Canada recommends both that the rationale of sentencing in Canada be anchored in a just deserts model and that drastic limitations be put on the use of incarceration. In its submission, the Law Reform Commission of Canada suggests that the highest maximum for custodial sentences – excepting sentences for murder – be set at seven years.

It is not altogether certain that advocating principles of retribution (strict just deserts) is consistent with preaching restraint with respect to incarceration or, in any event, is the better way to promote moderation. The wish expressed by Gaylin and Rothman in the above-quoted paragraph has not been fulfilled. Although a growing number of American states are reverting to retribution and just deserts models, not one jurisdiction has come close to adopting the recommendation of *Doing Justice* that no sentence of incarceration should exceed five years.¹¹

California was the first state to endorse retributivism in its legislation. The 1976 *Uniform Determinate Sentencing Act* states bluntly:¹²

The purpose of imprisonment for crime is punishment.

The new California legislation was followed by an increase in the number of offenders incarcerated and an increase in the length of their custodial sentences. Not one American state that has embraced the goal of retributivism has reduced its prison population (according to the latest figures, the Minnesota prison population is expected to rise, at best, slightly in the coming years). Making retribution the rationale for sentencing may not be the cause of such increases. Nevertheless, advocating both the justifiability of punishment and the need for restraint has not yet produced any perceptible restraining effects. Language being what it is, it is hardly surprising. Selling cigarettes in

packages with printed warnings that smoking is injurious to health does not seem to have directly affected the profits of the tobacco companies.

In a similar way, it may be argued that there is a measure of ambiguity in issuing a public policy statement that could be couched in the following language: "The purpose of sentencing is punishment. For this reason, we declare that no custodial sentence can exceed a maximum length of 5 (or 7, or 8) years."¹³

3.5 Community Sanctions and the Needs of Victims

There are a number of concerns, such as developing community sanctions as alternatives to incarceration* and being more sensitive to the justifiable needs of victims, which have recently attracted a growing share of attention. These concerns simply do not fit within retributivism and yet they point to the future. For example, the Criminal Law Reform Act, 1984 (Bill C-19) allowed for compensatory agreements between an offender and his or her victim, which were not in any way punitive (section 665 made a clear distinction between restitution orders for special damages and orders for punitive damages). Generally speaking, retributivism takes into account mostly the blameworthiness of the offender's behaviour; the sole victim need that it can really satisfy is a desire for revenge. Research has shown that this desire was much less acute than it was first intuitively believed. Research conducted for the Commission by Professor Irvin Waller has shown that none of the declarations of rights of victims from significant organizations (e.g., the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power) gave a prominent place to the need for revenge.¹⁴

More directly, the rediscovery of retributivism is essentially the outcome of a thorough study of incarceration in the United States and it has resulted in a narrow theory of criminal justice which links the sentencing process to the imposition of custodial sentences and to punishment. In fact, all three reports cited in section 3.3 of this chapter were studies of incarceration. These studies of imprisonment were as profound as their focus was limited. When we are urged to collapse sentencing and punishing, one into the other, the type of sentence on which the whole argument implicitly rests is a jail term, which, save for capital punishment, is the most punitive sentence in use.

There is no dispute about the justification for giving priority to an examination of incarceration, because its practice now raises problems which are in urgent need of a solution. The fundamental question which must be addressed in this report is whether incarceration is the future of sentencing. In view of the impressive body of official reports, research literature, official positions voiced by organizations involved in the field of criminal justice and public opinion surveys, the Commission must answer that it is not.

* As will become evident in later chapters, we prefer categorizing community sanctions as sentences in their own right, to viewing them indiscriminately as "alternatives to incarceration".

4. The Recommended Definition of Sentencing

As a conclusion to the preceding discussion, the Commission recommends that the following definition of sentencing be adopted:

Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.

This definition will be part of the recommended *Declaration of Purpose and Principles of Sentencing*, which appears at the end of Chapter 6.

4.1 Comments and Explanations

The avoidance of the adjective “criminal” (as in “criminal sanctions” or in “criminal offences”) is meant to reflect that the sentencing process reaches outside the scope of the criminal law in important ways. The number of statutes which carry penalties – including incarceration – is much greater than the laws codified in the *Criminal Code*. The enforcement of these statutes involves a process of sentencing.

Two notions are part of the meaning of the concept of sentencing: the notion of obligation (or coercion) and the notion of punishment. Upon their determination sentences *must be executed*. This obligation applies to the offender, when he or she is primarily responsible for the execution of his or her own sentence, which may be the simple payment of a fine; it also extends to correctional authorities, who have the charge of administering sentences of incarceration or of probation, to name obvious examples. Sentences also have, in varying degrees, punitive implications. However, the use of the words “legal sanctions” (instead of punishment) is designed to assert that the notion of obligation has precedence over the notion of punishment. This position is taken, because the notion of obligation is more comprehensive than the notion of punishment. The idea of coercion captures all the negative features implied by the notion of punishment. To be coerced into something is always unpleasant, the more severe forms of coercion (e.g., imprisonment) being identical with punishment. However, whereas the execution of all sentences is obligatory in law, not all sentences impose such a severe measure of deprivation that they can be properly called punishment (e.g., an absolute discharge and, to a lesser degree, a restitution order without any punitive damages). With regard to the legal obligation of applying sentences as they are determined by the judge, it must be noted that early release programs do not nullify the mandatory character of the sentence; it is the sentence as it was actually imposed by the judge that is the basis for the determination of the time which must be spent in prison, before eligibility for early release. A consequence of giving priority to the notion of obligation over that of punishment would be a stronger demand for an increase of the accountability of all those charged with the execution of the sentences.

There are important consequences to recognizing that sentencing is essentially a coercive process. Although this conception of sentencing does not emphasize the punitive aspects of the process, it does not lose sight of the fact that sentences are sanctions and that there are limits to what can be accomplished through coercion. Two of the new leading approaches advocated to ease the plight of victims – the compensatory approach and the reconciliatory approach – can be contrasted in this regard.

The critics of prison rehabilitation have shown in a definitive way that a policy which tried to do good for people against their will was self-defeating and begat nefarious consequences. The bitter lessons of repressive care ought not to be forgotten. The coercive features of the sentencing process should not be used to force the outcome of an issue which, such as reconciliation, requires a genuine and mutual desire from the implicated parties to restore harmony between them. This does not imply that the sentencing judge ought not to promote opportunities for reconciliation through the imposition of community sanctions, where a sincere desire for reconciliation is expressed by both parties. It does, however, mean that the judge should not *order* reconciliation to take place. It is conceivable that the judge may compel the offender to apologize to the victim and that this apology will bring contentment to the victim. However, one should not be under any delusions that such compelled apologies will restore harmony between the parties. Actually, forcing the show of external signs of reconciliation may further embitter the parties involved.

None of these difficulties exist in the case of the compensatory approach. Restitution can be imposed and enforced. Of course, an offender may be resentful at the prospect of being subjected to a restitution order. However, this resentment does not defeat the purpose of the measure, which is to compensate the victim regardless of how the offender feels. In contrast, a resentful reconciliation is a contradiction in terms. The fundamental difference between compensation and reconciliation is that the former implies a transfer of property to its rightful owner and the latter a mutual change of feelings. By contrast to the transfer of property, changes in feelings cannot be compelled by order.

The recommended definition puts equal stress on the fact that it is a *person* on whom a sentence is imposed and that the cause of this plight is the conviction for an offence. Retributivists stress the blameworthiness of the conduct and sometimes forget that they are imposing suffering on a person. Utilitarians view the offence as providing a clue to the whole personality of the offender which unduly becomes the real target of the penal intervention (if the offender can be redeemed he will be enrolled in a rehabilitation program; if his dangerousness cannot be remedied, he will be preventively incapacitated). Putting exclusive emphasis on the offence or on the offender has resulted in serious neglect of the principle of restraint. Thus, it appears necessary to give proper consideration to both elements in order to achieve a balance in sentencing.

One of the most basic issues which has to be addressed by a sentencing theory and policy is whether sentencing ought to be directed primarily toward the past delinquent behaviour of the offender or the future consequences of his sanction. Retributivism and just deserts theory have a retrospective orientation: they justify a sanction on the grounds of the blameworthiness of the offender for past offences. Utilitarianism on the other hand, is forward oriented: the sanction is justified by its future beneficial consequences. The definition of sentencing recommended by this Commission does not, in itself, favour retributivism or utilitarianism. However, this does not imply that the Commission favours neutrality on this crucial issue. It will be addressed in detail in Chapter 6 which is devoted to a discussion of the rationale and principles of sentencing. At the present stage of the discussion, the points made in the previous paragraph suggest that sentencing should be looking backward at the blameworthiness of the conduct, without however remaining oblivious to the possible future rehabilitation of the sentenced offender.

Finally, the recommended definition of sentencing is meant to convey the notion that there are numerous sanctions from among which the judge can choose. For reasons that will be explained in Chapter 12 and which have basically to do with the need to move from under the shadow of incarceration, the Commission does not think that it is desirable to dichotomize all sanctions into custodial and non-custodial or into incarceration and alternatives to incarceration. Hence, sanctions will be classified in this report into custodial sanctions and community sanctions. The phrase “community sanctions” is preferred to the more common “community-based sanctions”, because the latter is too closely associated with community service orders. Although some sanctions, like absolute or conditional discharges and fines, are served or discharged within the community, they are not viewed as involving the community to the same degree as the performance of a community service order. Nevertheless, one of their explicit purposes is to avoid separating the offender from the community for any period of time. It is interesting to note in this regard that the word “fine” originally comes from the French “fin” which means “end”. Accordingly, the fine was used to “end” (actually to vacate) a more severe sanction such as custody. The implications of viewing a fine as a community sanction in its own right will become clearer in the light of the Commission’s proposals to make imprisonment for defaulting on a fine an exceptional measure. A fine is not a stopover on the way to prison; it ought to be a sanction in its own right.

The report further proposes to break down the community sanctions into two main components; namely compensatory community sanctions and non-compensatory community sanctions. The first category encompasses restitution, compensation, forfeiture, community service orders and fines. The second category includes absolute and conditional discharge, probation, prohibition, and a measure such as house arrest, if it is implemented in Canada. Custodial sentences include terms of imprisonment in a provincial prison or in a federal penitentiary, a stay in an open custody facility and intermittent custody.

5. Additional Features of Sentencing

There are important features of sentencing which cannot be included in a definition and which must be independently explained. Four important features will now be discussed. The first of these features is that sentencing is a process; the second one is that the scope of this process is limited; and a third feature is that this process is discretionary.

One last feature to be discussed is negative: due to lack of adequate information systems and a lack of feed-back mechanisms, the sentencing process is for the most part blind to the trends in its operation and also to the result of its operation.

5.1 Sentencing as a Process

Sentencing is not static, it is a process which extends over time and which unfolds in stages.

The sentencing process extends over time in at least two different ways. First, it involves the time of individuals who play a part in it. Some of these individuals – for example, an offender who may be on remand – are entitled to know what their fate is going to be without undue delay.

Second, the sentencing process is a historical process and it is the object of changes. As discussed earlier, changes affecting the sentencing process have been piecemeal and incremental. They also have been shaped by external events rather than introduced by advanced planning. There is in this regard a need in Canada for monitoring the changes which occur in the sentencing process and for integrating these changes into a consistent structure, in order to keep the process in tune with the requirements of society and to preserve the efficiency of its operation.

The sentencing process is also a multi-stage process and its unfolding involves several components of the criminal justice system. This fact is explicitly acknowledged by the Commission's terms of reference which direct it to examine pre-sentencing issues, such as prosecutorial discretion and plea and charge negotiations, and also post-sentencing issues, such as parole and remission. The professional involvement of various officials in the sentencing process has several implications. It implies first of all that the judiciary does not control the whole operation of the sentencing process. This lack of control, in turn, has a dramatic effect on the capability of the sentencing process to achieve its goals (however they may be stated). Admittedly, there must be co-ordination between the different parties if the system is to work. However, beyond this obvious requisite lies a limiting principle: the more numerous are the intermediates between an initial decision and its final outcome, the less related the beginning and end become. If a judge wants to deter an offender by giving him a severe custodial sentence, which is then reduced to one-third of its duration for rehabilitative purposes by a parole board, it becomes very difficult

to assess to what extent the judge or the parole board have failed, if the offender recidivates, and to what extent either has succeeded, if the offender becomes a law-abiding citizen. These questions will be more fully explored when the goals of sentencing are addressed.

5.2 The Sentencing Process Is Limited in Scope

This feature is immediately related to the previous one. Only a small percentage of the offences *reported to the police* eventually result in the imposition of a sentence upon an offender. This percentage is said not to be in excess of 14% in England.¹⁵ These figures are similar for Australia. The percentage is estimated to be as low as 2% in certain urban areas in the United States, where crime rates are particularly high. No systematic study of the percentage of offences for which the courts actually pass sentence has been yet undertaken in Canada. However, a pilot study commissioned by the Law Reform Commission of Canada has assessed this proportion to be 8.5% of offences known by the police for the jurisdiction under study (Canada, 1975 c; 168). This figure is high and would no doubt be smaller, had the research been undertaken in a large Canadian city.

The reasons for the small percentage of offences for which an offender receives a sentence are many. Not all crimes reported to the police are solved. The clearance rates for very frequent offences, such as theft or breaking and entering into a dwelling house, are less than 20%. More than 80% of the offenders who have committed these offences do not appear before a judge. Most importantly, however, all the officials who intervene at one stage or another preceding the actual imposition of a sentence – social workers, police personnel, Crown attorneys, act as filters that screen out offenders before they ever reach the sentencing stage of the criminal justice process. Only a minority of offenders reach that final stage.

These remarks only concern reported crime. The amount of crime that is unreported is referred to as “the dark figure of crime” by criminologists and legal scholars. They argue that this figure is quite high. Depending on the offence – and with the possible exception of murder and very high visibility offences such as hijacking – it is estimated that the actual rate of unreported crime is at least three times higher than the reported rate.¹⁶ For instance, it is a well known fact that for every ounce of hard drugs a narcotic squad seizes, twenty more reach the street.¹⁷

When the complete picture is taken into account, it becomes obvious that the application of the sentencing process is limited to a small proportion of offenders. In the best of circumstances, it is doubtful that more than 3% of all offenders who have committed a criminal offence during any given year end up before a sentencing court that same year. Needless to say, this is an aggregate figure for all crimes. It should be noted that the percentage of offenders sentenced for a crime like murder is significantly higher. It must also be added that if an offender is a career criminal, the chances that he will eventually be

arrested and brought before the tribunal are increased. There are other qualifications which could be made, but the sum-total of these qualifications would not invalidate the conclusion that sentencing has serious limitations as an instrument for crime control. Its actual reach, as compared to the total amount of crime, is little more than a scratch on the surface and this situation is unlikely to change. Due to the pressures under which the criminal justice system is presently operating, the frequency of pre-trial diversion is bound to increase. There is no reason to foresee that the proportion of crime that will be reported is going to grow in the future. Indeed, a large percentage of crime is of the nature of a transaction between a client (who may be considered in some cases to be a victim) and a provider of illegal services. Such transactional crime implies in most instances a form of consent between the offender and his or her clients and remains unreported. This type of criminality is on the rise and its occurrence inflates the rate of unreported offences.

5.3 Discretion and the Sentencing Process

It is acknowledged that the exercise of discretion is a feature of the sentencing process. This feature has already been partly discussed in Chapter 3, in relation to the fact that the present maximum penalties provided by the law offered little guidance to the sentencing judge. Nevertheless, important points still remain to be made.

Several officials play an important part in the sentencing process. These officials, such as the police and Crown attorneys, also exercise discretion in their decisions. There is now a consensus among several authorities in the field of research on sentencing that the total amount of discretion which is exercised within the sentencing process remains more or less at the same level.¹⁸ This view implies that discretion has a tendency to shift among the different actors in the sentencing process: constraints on the discretion exercised at one level of the process are usually matched by an increase in discretionary power at another level. If, for instance, you limit the scope of judicial discretion by enacting minimum penalties, you thereby grant more leverage to the Crown attorney in plea negotiations: an offender is more likely to plead guilty to a lesser charge if the Crown has the option to prosecute him or her for an offence carrying a high minimum penalty (e.g., seven years imprisonment). The notion of the transfer of discretionary power is an important consideration for the development of sentencing guidelines because it stresses the necessity of achieving a balance in discretion.

The determination of a sentence implies three fundamental decisions and for all three, the sentencing judge enjoys a certain amount of discretion. This statement does not pretend to recreate what actually goes on in the mind of a sentencing judge. It only means that when a sentence is determined, three kinds of issues have been resolved. The first issue is the *nature of the sanction*, which takes care of questions related to whether or not to segregate the offender from society. The issue is resolved by choosing between a custodial sanction and a community sanction. This issue is referred to as the “in/out decision” in the sentencing literature.

The second issue relates to the specific *type of sanction* to be used. Depending upon the previous decision about the nature of the sanction, this second issue is resolved by the selection of a particular type of sanction from among the community sanctions, where the choice is rather wide, or the custodial sanctions, where the choice is more narrow (open or closed custody and intermittent custody).

The third issue is the *quantum of the sanction*. Since most sanctions can be broken down into units of time or money, a quantum must be determined. All three issues are difficult to solve. However, for reasons that will now be discussed, the issue of quantum is particularly problematic.

There are some sanctions, such as restitution, compensation and forfeiture, where the nature of the offence offers guidance for setting the quantum of the sanction. To take an obvious example, what has been stolen by an offender naturally determines what should be the object of a restitution order. There is, however, no natural connection whatsoever between a certain number of years in prison, in the case of a custodial sanction, or a given number of hours of community services, and the offence for which these sanctions are the consequence.

The only questions relating to quantum which can be resolved with a relative sense of certainty are those which require *comparisons* between offences on the one hand, and sanctions on the other hand. It is easier to decide whether the maximum period of imprisonment (or the tariff) for an offence should be higher, lower or the same for an offence than for another than it is to determine precisely what that maximum penalty (or what that tariff) should be. This predicament itself offers a clue as to how to solve the issue of quantum. In resolving such issues, the penalty structure must take precedence over its elements. In other words, one does not start from the isolated case to determine quantum. One must begin with a whole set of offences and rank them according to their relative seriousness. It is only within this ranking structure that the principle of proportionality can then be used, on a comparative basis, to allocate a quantum of sanction to each offence.

There remains another problem. Numbers can mean very different things to different people. A fine is onerous or insignificant depending upon one's financial resources. For an Arctic native or for the provider of a family, a period of incarceration may have more destructive consequences than for people whose life circumstances are different. Above all, for people who enjoy their freedom, the length of a sentence of imprisonment remains an abstract figure, whereas it is the object of a concrete and painful experience for an inmate. In trying to assess whether a sanction is proportionate to an offence, it is imperative to move from the abstract realm of numbers towards their meaning in real life experience. On paper, ten years (in prison) may appear to be a small figure. For a person who was sent to prison at 20 years of age and was released at 30, it means having been deprived of youth. By any standard this should be considered a severe punishment.

5.4 Information, Feed-back and Sentencing

If, as this report claims, the only way to determine the quantum of a sanction, which is not prone to arbitrariness, is to proceed on a comparative basis, then providing judges with information on sentences, to which they can compare their own practice, is not a simple matter of statistics but rather of justice.

Several kinds of information must be provided for the judges and policy-makers. First of all, there must be uniform statistical data on the sentences for the different offences. Second, there should also be knowledge of the effects of different sanctions on offenders. In other words, there should be information on the outcome of the operation of the sentencing process. This takes on particular importance with regard to evaluating the success of new sentencing initiatives in community sanctions. Third, it is crucial that the sentencing judges be aware of the available resources and facilities within their respective jurisdictions. This requirement goes beyond the mere listing of existing programs. It also implies that the program be described and their goals identified.

Right now, the dearth of sentencing data stands in dire contrast to the wealth of crime statistics. This situation is not peculiar to Canada. The Commission was able to verify through its investigations that the state of sentencing information was not noticeably better in many other countries.

Problems such as the lack of data and, when data are available, questions about their completeness, their accuracy and their compatibility, can be provisionally solved through research programs. There is however a critical difference between solving these problems on an *ad hoc* basis, for the purposes of a special inquiry such as was successfully conducted by this Commission, and providing a lasting solution to the information problem by developing permanent reliable information systems. The latter task must confront difficulties such as structuring into an operating network data bases which are now scattered between different provincial and federal departments. It is however absolutely crucial that these difficulties be overcome. Any meaningful reform of the sentencing process is bound to be eventually defeated if there is no way to assess how this process is evolving. Part of Chapter 14 is devoted to examining what the options are with regard to the development of information systems and to recommend what appears to be the best course to follow.

Endnotes

- ¹ See Law Reform Commission of Canada (1974c), *Studies on Sentencing*, p. 4. The same definition is given in Law Reform Commission of Canada (1974a), *The Principles of Sentencing and Dispositions*, p. x.
- ² See, for example, Ashworth (1983; 16) and Blumstein *et al.* (1983; 48). Ruby and Nadin-Davis usually avoid identifying the aims of sentencing with the aims of punishment. Occasionally, they do make the identification (e.g., Ruby, 1980; 2 and Nadin-Davis, 1982; 30).
- ³ An example of this kind of translation can be found in sub-clause 2(10) of the Criminal Law Reform Act, 1984 (Bill C-19). The French translation of *The Principles of Sentencing and Dispositions*, a working paper published by the Law Reform Commission of Canada, provides numerous examples of translating "sentence" by the French "peine".
- ⁴ The definition provided by Wasserstrom (1980; 121) is actually more elaborate and its complete formulation is the following: punishment is the imposition of a deprivation, according to the following conditions: (i) the deprivation is imposed because it is a deprivation; (ii) there is the belief that the person upon whom the deprivation is imposed is guilty of wrongdoing; (iii) the person upon whom the deprivation is being imposed is to understand that the deprivation is being imposed because the two former conditions are present.
- ⁵ Wasserstrom (1980) shows beyond dispute that the frequently quoted definition of punishment provided in Hart (1968; 4-5) falls into this type of circularity. Wasserstrom himself does not completely succeed in avoiding circularity in defining punishment; problems with the definition of punishment make it more difficult to provide a justification for punishment which is entirely satisfactory. Wasserstrom concludes his chapter on punishment by saying that "whether it is right to punish persons and, if so, for what reasons, are, I think, still open questions both within philosophical thought and the society at large". (Wasserstrom, 1980; 146).
- ⁶ Very cruel and unusual punishment can be used to deter (e.g., flogging, the infliction of torture), to incapacitate (lengthy periods of solitary confinement) and to "rehabilitate" (the use of powerful drugs, surgical operations).
- ⁷ See Walker (1971; 3-22).
- ⁸ *Reference Re s. 94(2) of the Motor Vehicle Act*, (1986), 63 N.R. 266 (S.C.C.).
- ⁹ See von Hirsch (1976), *Doing Justice*, preface, p. xxxix.
- ¹⁰ von Hirsch (1976), preface, pp. xxxix-xl.
- ¹¹ von Hirsch (1976; 136).
- ¹² *California Penal Code*, ss. 1170 (a)(1).
- ¹³ The 5 year ceiling was proposed in the above quoted report, entitled *Doing Justice* (von Hirsch, 1976). The 7 year ceiling was proposed as a working hypothesis in a submission received from the Law Reform Commission of Canada. The 8 year ceiling was proposed in a report commissioned by the Twentieth Century Fund Task Force on Criminal Sentencing (*Fair and Certain Punishment*, 1976).
- ¹⁴ See Waller (1986), *The Role of the Victim in Sentencing and Related Processes*. See Appendix A.
- ¹⁵ Compared to estimates in other countries, this figure is rather high. It is quoted by Andrew Ashworth in an unpublished paper given at a seminar on sentencing which was held in Canberra, Australia. See Ashworth (1986), *Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems*. If Ashworth's own estimation of the percentage of unreported crime is taken into account, "one is left with around 7 percent of all offences for which the courts actually pass sentence" (p. 11).

- ¹⁶ According to the Canadian Urban Victimization Survey of 1982, undertaken in seven major Canadian cities by the Ministry of the Solicitor General of Canada, approximately only one third of assaults, sexual assaults, thefts (personal and household) and vandalism were reported to police (see *Bulletin, Victims of Crime* (1983), 1, p. 3). The amount of reported crime is higher for offences such as break and enter and theft of motor vehicle, partly due to the fact that many insurance companies will not accept a claim for stolen property if these offences are not reported to police. The figures given in the *Bulletin* are minimal and apply to seven selected offences. It can be inferred from Manning (1977), which is a study of police work both in England and the United States, that the amount of unreported crime is between four and nine times higher than the official rates, depending on the nature of the offence. Hulsman and Bernat de Celis (1982: 69) quote an experiment conducted in Germany, according to which *one* criminal incident in a possible 800 was actually reported.
- ¹⁷ See the R.C.M.P.'s annual reports which document the quantity of drugs that were seized in a year. For instance, in 1981, the R.C.M.P.'s "C" division which operates in Québec, did not even seize one kilo of heroin (824.2 grams); in 1984 it seized 2 kilos and 200 grams of heroin. These are rather small figures compared to the magnitude of drug addiction. For a general discussion, see *The Narc's Game*, by Peter K. Manning (1980).
- ¹⁸ See Wilkins (1981). This theory, according to which the sum-total of discretion which is exercised by the different participants in the sentencing process varies little, is known as the "hydraulic" theory of discretion.

Chapter 6

A Rationale for Sentencing

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Chapter 6

A Rationale for Sentencing

According to the 1984 government policy statement entitled *Sentencing*, the Canadian Sentencing Commission was appointed to consider some remaining concerns that the Criminal Law Reform Act, 1984 (Bill C-19) could not address in a comprehensive manner (Canada, 1984; p. 59). The purpose and principles of sentencing were not originally included among these remaining concerns, since section 645 of Bill C-19 already provided a *Declaration of Purpose and Principles of Sentencing*. However as Bill C-19, having died on the order paper, never became law, the Commission was left to undertake its mandate without the benefit of a legislated statement of purpose and principles. It was therefore incumbent on the Commission to fill the void by developing a rationale for sentencing prior to addressing the more specific aspects of its mandate. This necessarily entailed a review of the *Declaration* contained in Bill C-19 to assess whether it was satisfactory or in need of amendment.

This chapter is devoted to the articulation of a sentencing rationale. It is divided into four main sections. First, general comments are made to elucidate the notion of a sentencing rationale and to state criteria of adequacy which should be respected in the formulation of a sentencing rationale. Second, the most oft-quoted sentencing goals in jurisprudence and in the sentencing literature are reviewed and an assessment is made of the degree to which they are now or can be achieved by the sentencing process. Third, the adoption of an overall purpose of sentencing is recommended on the basis of the previous analyses. Finally, the Commission recommends a Declaration of the Purpose and Principles of Sentencing for Canada.

1. The Nature of a Sentencing Rationale

According to legal doctrine, a sentencing rationale provides an answer to the following question: what is the justification for imposing legal sanctions? This question is usually raised in the context of the more severe sanctions such as incarceration. Excepting Montero's aim – the protection of offenders against unofficial retaliation – which is an important but subsidiary goal, there have been until recently two fundamental ways of resolving the issue of justification.

The first one, associated with retributivism and just deserts, is to provide moral reasons for imposing a sanction. According to this perspective, justice requires that *retribution* be exacted from those who are guilty of blameworthy behaviour. No further ground is offered to support this statement, which has the status of a postulate (why punish instead of forgiving is certainly a pertinent moral question; it is not addressed by retributivism). Retributivism is directed towards the past behaviour of the offender and stresses the necessity of a public condemnation of this behaviour. *Denunciation* of blameworthy behaviour is claimed to be a prominent goal of sentencing. The second way to address the issue of justifying sanctions has been in terms of 'their future beneficial consequences or, in other words, their social utility. The social utility of sanctions was defined originally in terms of crime prevention or crime control. This general aim was to be achieved by deterring potential and past offenders, by incapacitating them and by rehabilitating them. The three traditional utilitarian goals – *deterrence* (both general and special), *incapacitation* and *rehabilitation* – were at times pursued simultaneously or viewed as alternative strategies for controlling crime.

Retributivists and utilitarians construed the issue of the justification of legal sanctions differently. The retributivists asked *why* there should be sanctions and provided a moral ground for them (punishment is justified *because* of a past offence). The utilitarians asked *what* should sanctions be imposed *for* and answered the question with a statement of goals which were oriented towards the future.

Until ten years ago, these were the two main approaches to solving the issue of the legitimacy of penal sanctions. There is now a third approach which attempts to blend morality and utility in advocating that sanctions provide redress for the victims of crime. Redress is then understood in a very wide sense and ranges from procedural requirements – such as the introduction of victim-impact statements in the sentencing process – to the development of compensatory sanctions and reconciliation programs, which are victim oriented. This third approach, which is still nascent, is more of a supplement than a replacement of the two mainstream trends. It aims to promote the rights of victims which are said to have been neglected in the exercise of criminal justice.

This enumeration does not claim to be exhaustive. Its purpose is to provide a framework on which to build the following discussion. There is however a further distinction which should be made with regard to the goals of sentencing.

When discussing the goals of criminal sanctions, it is important to make distinctions between *normative* and *functional* goals. Normative goals refer to desired external effects of a system. All traditional utilitarian goals, such as rehabilitation, deterrence and incapacitation, and retributivist goals exemplify normative goals. Functional goals are objectives which are relevant to the internal operation of the system. For instance, using plea negotiations in order to process cases more expeditiously or changing the scale of punishments in order to stay within prison capacity are examples of achieving functional goals.

Since functional goals are not always explicit and sometimes even unavowed (e.g., some aspects of plea bargaining), their importance in the penal system has not yet been systematically appraised. There is however a noticeable exception to this assertion. It is the issue of prison population versus prison capacity, which is now attracting greater political attention and is generating a growing body of research literature. The increasing prominence of this issue is actually quite revealing of the confusion which prevails in the area of penal goals. It is now proposed that penalties be tailored precisely to fit prison capacity. A telling illustration of this trend is given by Alfred Blumstein (1984; 132), who was the Chairman of the U.S. Panel on Sentencing Research:

Here, prison capacity can provide clear guidance to an appropriate proportionality constant. For example, if the jurisdiction had 1,000 prison cells available for just burglars and robbers, and if they typically sentenced approximately 400 burglars and 300 robbers, then a sentencing schedule of one year for burglary and two years for robbery (which would just use that available capacity) would be preferable to longer sentences that also had a two-to-one ratio, since the longer ones would exceed the available prison capacity.

The right proportion between the offence and its punishment is thus decided on purely pragmatic grounds (prison capacity). The significance of this proposal is obvious: a functional goal is suddenly endowed with normative value and far from being subsidiary, it is given priority over traditional normative goals (e.g., just deserts, deterrence).

There is also another recently-acquired feature of functional goals which deserves mention. Up until the seventies, normative and functional penal goals were thought to be in relative harmony. They are now often perceived to be in conflict: the paradigm case being the functional goal of plea negotiation, which raises serious doubts as to its consistency with the normative aspects of justice (the rights of the innocent, equity, due process, etc.).

In these preliminary remarks devoted to the establishment of basic distinctions, retributivism and utilitarianism have been contrasted as have been normative and functional goals. It remains to be shown that a synthesis between these different perspectives on sentencing goals is an absolute requirement of any successful attempt to develop a sentencing rationale which is not truncated.

1.1 A Complete Sentencing Rationale: Goals and Principles

In section 5.3 of Chapter 5, the need to arrive at a principled determination of the quantum of a sentence was stressed. With regard to this problem, H.L.A. Hart makes a crucial distinction in his book on punishment (Hart, 1968; Chapter 1). The importance of Hart's distinction has been acknowledged by several penologists, including Andrew von Hirsch. Hart proposes to make a distinction between the issue of the justification of legal sanctions – *what* justifies legal sanctions – and the issue of the allocation of legal sanctions – *how much* deprivation to impose?

It was pointed out in Chapter 5 that it is necessary to apply the principle of proportionality within the context of a group of offences previously ranked according to their relative seriousness, in order to determine properly the quantum of the sanction. This conclusion suggested that the issue of the allocation of sanctions – the question of how much – had its own complexity and was relatively independent of the issue of the justification of penal sanctions. Actually, Hart's distinction can be used to point out a mistake which is all too common in sentencing theory and practice. There is a general tendency to bridge the gap between the *what* and the *how much* by using a simplistic formula: *increasing* penal sanctions invariably results in an *equivalent increase* of the benefits alleged to justify their existence. If you justify sanctions by their deterrent effect, you may be led to believe that the more severe a sanction is, and consequently the more offenders we incarcerate, the more we reduce crime rates. If your sentencing rationale is the imputation of blame, to state a final example, you may again assume that the more severe sanctions imply greater denunciation.

All these assumptions are recognized fallacies. In an authoritative book on deterrence, Zimring and Hawkins (1973; 19) have provided a scathing description of simple-minded beliefs about deterrence:

If penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will be deterred; if doubling a penalty produces an extra measure of deterrence, then trebling the penalty will do still better.

Equating an increase in the frequency or the severity of a sanction with an increase in the social benefits which are presumed to result from it, does not fare better with regard to incapacitation or to denunciation. Not only is the corresponding assertion about incapacitation refuted by the facts (prison population and crime rates tend to rise at the same time) but its logic is absurd; transforming all society into a prison would generate the biggest crime problem in history because no environment known to man is more crime-ridden than a prison (rape, violent assault, theft, murder, drug abuse, etc.). Finally, any punishment grossly disproportionate to an offence would in all likelihood be perceived as self-denunciatory rather than as the ascription of deserved blame.

The upshot of this argument is that a statement of goals may resolve the issue of justification — the reason for the imposition of sanctions — and it also may supply legitimacy to the criminal justice system. However, it desperately needs to be supplemented by principles to settle the question of “how much sanction” and, thereby provide useful guidance to sentencing judges. Indeed, the issue of allocation or of quantum lies at the heart of the sentencing process.

It has been shown, so far, that focusing upon sentencing goals as the utilitarians did could not bring about the resolution of the issue of allocating a quantum of sanction. It can be demonstrated also that principles such as proportionality or equity, which are fundamental for solving the question of allocation, are in themselves inadequate in resolving the issue of justification.

Andrew von Hirsch, who is presently the leading exponent of the just deserts perspective in the U.S., makes this point:¹

The principle of commensurate-deserts addresses the question of *allocation* of punishments – that is, how much to punish convicted offenders. This allocation question is distinct from the issue of the *general justification* of punishment – namely, why the legal institution of punishment should exist at all (our emphasis).

The assertion that sanctions are commensurate with the blameworthiness of conduct does no more to legitimize the existence of penal sanctions than the fact that income tax is proportionate to revenue justifies the practice of taxation in itself. In the same way that utilitarian goals have to be supplemented by principles of justice with regard to the question of allocation, retributivism and just deserts must borrow utilitarian arguments to convincingly address the issue of justification. For strict retributivists, a justification of punishment amounts to little more than the blank assertion that justice commands us to punish. Immanuel Kant, to whom modern retributivist thought can be traced, spoke thus:²

Even if a civil society were to dissolve itself by common agreement of all its members, (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must be executed so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Von Hirsch, who at one time was influenced by Kant, nevertheless has made the point repeatedly that the pursuit of penal justice for its own sake appears purposeless:³

Were one convinced that punishment had *no* usefulness in preventing crime, one might well wish to dispense with the criminal sanction (von Hirsch, 1983b,; 68).

Had punishment no preventive value, the suffering it inflicts would be unwarranted (von Hirsch, 1985; 54).

I also think it is preferable to have a general justification for the criminal sanction that is expressly consequentialist (utilitarian) in part. This makes the warrant for the existence of punishment dependent on that institution's having significant crime-preventive benefits (von Hirsch, 1985; 59).

It would be mistaken to infer from the preceding analyses that one has only to cap retributivist principles with utilitarian goals to produce an adequate sentencing rationale. This would only generate confusion. There are, however, significant conclusions that can be drawn from the preceding discussion. First of all, no sentencing rationale can pretend to be complete and useful if it does not supply both purpose and principles. Second, the achievement of the proposed purpose(s) must result in some perceptible social benefits; finally, the principles should ensure that the search for social benefits is exercised in accordance with the principles of fundamental justice.

1.2 A Complete Sentencing Rationale: Normative and Functional Goals

A distinction was made previously between normative goals, which are ends in themselves, and functional goals, which regulate the process by which the ends are achieved. It was also noted that functional goals were, under normal circumstances, secondary in importance to normative goals.

With regard to this distinction, there is one issue which is rather thorny. As we have said before, staying within prison capacity is a functional goal of sentencing, although in the U.S., this imperative is now superseding normative goals. It is not surprising that penologists and correctional administrators in that country have become preoccupied with the rising prison population: in 1982 there were no fewer than 32 American states or territories which were either under court order due to the degraded conditions of confinement resulting from prison over-population or were involved in litigation likely to result in such court orders. It would seem then that the issue of prison overcrowding involves values such as maintaining a reasonable level of the quality of life and basic human rights.

In Canada, it is not inconceivable that prison overcrowding may lead to court litigation on the basis of the Charter prohibition of cruel and unusual punishment (section 12). The issue of staying within prison capacity falls into a problematic area between normative and functional goals and has been considered very carefully by the Commission.

Furthermore, according to a national survey of public opinion undertaken in 1986 by this Commission, 70% of the respondents voiced the opinion that the government should develop alternatives to incarceration rather than spend taxpayers' money to build more prisons (only 23% of respondents favoured building new jails). These results indicate that staying within prison capacity is more than just an administrative concern for criminal justice officials.

1.3 Clarity, Consistency and Realism

The preceding remarks have stressed the need for completeness in formulating a sentencing rationale. There are other criteria which also deserve important consideration. These criteria are clarity, consistency and realism. Their importance lies in the fact that not respecting them would undermine the point of developing a sentencing rationale in the first place.

In the opening paragraph of its discussion of the purpose of the criminal law, *The Criminal Law in Canadian Society* declares (p. 38):

The basic problem confronting criminal law and the criminal justice system, it is often argued, is not the variety of specific concerns and complaints about particular phenomena – which are mere symptoms – but rather a debilitating confusion at the most basic possible level, concerning what the criminal law ought to be doing.

In the particular field of sentencing, research on disparity conducted on behalf of the Commission has shown that the most frequently alleged cause for unwarranted variation in sentencing was confusion about the purposes of sentencing.⁴

A sentencing rationale supplies the foundation for solutions to unwarranted variation. It is not in itself the final answer to disparity because, even when it is carefully worded, a declaration of the purpose and principles of sentencing remains a general statement which must be supplemented by more specific guidance to have an impact on practice. There is, however, another function that is performed by a legislated sentencing rationale. It makes known to the community what are the grounds for imposing penal sanctions and the principles governing the sentencing process.

If a sentencing rationale is to provide guidance to the judiciary and enlightenment to the general public, the need for it to be clear, consistent and realistic is self-evident. Some implications of these features have to be discussed.

There is an obvious requirement that no word with several different meanings should be used in the formulation of a statement: clarity implies the absence of equivocation. Yet there is one fundamental equivocation which runs through most of the federal government reports on the criminal justice system: a general tendency, when ascribing goals, to confuse the sentencing process with the whole criminal law and with the entire criminal justice system. The same overall purpose – the protection of the public – is ascribed to both the sentencing process and the criminal law itself. This tendency to identify the part with the whole will have to be examined to determine whether it ultimately generates confusion.

The need for a synthesis between retributivist or just deserts principles and utilitarian types of goals has been acknowledged. However, inconsistency has proved to be a stumbling block in many attempts to develop such a synthesis. Inconsistency cannot be avoided if its possibility is denied. Insensitivity to possible conflicts between objectives ascribed to the criminal justice system – and to the sentencing process – is another trait of official literature on the criminal law. There are, however, genuine inconsistencies between traditional penal goals. For example, the youth of an offender is a mitigating factor under a rationale of rehabilitation. It is an aggravating factor under a policy of selective incapacitation, because youthfulness is believed to be one of the most reliable factors in predicting recidivism.

Another significant example can easily be provided. The ethical foundation of retributivism lies in the following principle: it is immoral to treat one person as a resource for others. From this principle it follows that the only legitimate ground for punishing a person is the blameworthiness of his or her conduct. It also follows that sanctions must be strictly proportionate to the culpability of a person and to the seriousness of the offence for which that person has been convicted. (Any deliberate disproportion would imply that

persons are being used as resources for that part of their sanction which does not flow from the blameworthiness of their conduct.) According to these principles, all exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified, because they imply that an offender's plight may be used as a means or as a resource to deter potential offenders.

There are several ways to avoid inconsistencies. First, principles or goals which are clearly antagonistic should be excluded from the formulation of a sentencing rationale. Second, when the contradiction between goals or the principles is not overt, one can rank in priority the concerns that may be at some point conflicting, thus providing a way to resolve dilemmas arising from the need to consider competing principles. A third way is to use differentiation. Instead of formulating a cluster of goals and enumerating sanctions separately, it may provide appropriate guidance to match explicitly particular goals with particular sanctions. The ascription of diverging goals to different sanctions may resolve inconsistencies.

Finally, and most importantly, a sentencing rationale should be in basic accordance with the reality of the sentencing process. This requirement has two basic consequences. The first is that goals and principles which are repugnant to the very nature of the sentencing process (or to some of its important aspects) should not be assigned to it. For instance, caring for a person calls for gratifying that person on some occasions; curing a person requires that the person under treatment wishes to be cured and co-operates. Neither caring for nor curing should be described as goals of a process which involves deprivation and coercion. The second consequence implies the notion of degree. Even if a goal agrees in theory with the sentencing process, it should not be subscribed to in a fundamental way if there can be no reasonable expectation that it will be achieved to any significant degree. Any wide discrepancy between the stated aims of the sentencing process and its results is bound to have an adverse effect on public opinion and to backfire. It is also bound to demoralize those professionally involved with the operation of this process.

2. Achieving the Goals of Sentencing

An assessment of the actual degree to which the goals of sentencing are achieved will now be made. The goals under review are the traditional utilitarian goals of deterrence, incapacitation and rehabilitation; as well sentencing aims which are associated with the retributivist perspective, such as exacting retribution from an offender and denouncing blameworthy behaviour will be discussed briefly.

There has been a large amount of research into verifying the extent to which the utilitarian goals are achieved by the sentencing process. For instance, the *Bibliography on General Deterrence Research* (Beyleveld, 1980) is 452 pages long and it reviews 568 research papers. Since 1980, a great number of papers have been published and could be added to this list. The Commission

did not believe that sponsoring more empirical studies on the utilitarian goals of sentencing would make a significant difference with regard to its appraisal of the efficiency of sentences. Research undertaken for the Commission in this field took the form of reviews of the existing literature on utilitarian goals in Canada and elsewhere. The most exhaustive research conducted so far on the utilitarian goals of sentencing was undertaken by two panels created by the U.S. National Academy of Sciences. One of these panels examined the deterrent and incapacitative effects of sentences – Blumstein, Cohen and Nagin (1978) – while the other estimated the success of rehabilitation programs – Sechrest, White and Brown (1979). The Commission will rely on its own research and on the systematic investigations of these two U.S. panels in assessing to what extent one can expect the sentencing process to achieve the goals which traditionally have been assigned to it.

2.1 Deterrence

According to research conducted for the Commission, deterrence came to be a target of judicial criticism in the 1970's. However, it was back in favour in the early 1980's and subsequently regained its former pre-eminence in Canadian appellate jurisprudence (*Young, 1985, 71*). Of all the utilitarian goals, deterrence is now the most frequently invoked. It is also the most wide-ranging. Not all sanctions can be said to be incapacitative or rehabilitative. However, it can be claimed that any sanction has a deterrent effect.

Deterrence is either general or individual (specific). General deterrence aims to discourage potential offenders. It is defined by the Panel on Research on Deterrent and Incapacitative Effects (1978; 3) as “the inhibiting effect of sanctions on the criminal activity of people *other than* the sanctioned offender” (emphasis in text). Individual deterrence aims to discourage the sanctioned offender from re-offending.

Such factors as the rate of recidivism, the relative success of early release from custody and the “undeterrability” of certain groups of offenders have called into question the possibility of achieving with any significant degree of success the goal of individual deterrence. It is an acknowledged fact that most prison inmates have been convicted on prior occasions. According to *Basic Facts About Corrections in Canada, 1986*, 60% of offenders released from federal institutions on mandatory supervision between 1975 and 1985 subsequently were re-admitted to a federal penitentiary; 49% of federal parolees were also re-admitted to a federal institution during that same period of time. Research on career criminals has shown that generally they were not inhibited by the threat of penalty (Petersilia, Greenwood and Lavin, 1978; xiii, 119). Research appears to have taken stock of these facts and most studies are now conducted in the field of general rather than individual or specific deterrence.

With regard to general deterrence, the overall assessment of the deterrent effects of criminal sanctions ranges from an attitude of great caution in expressing an opinion to outright scepticism. The first attitude is exemplified by the panel sponsored by the U.S. National Academy of Science:⁵

In summary...we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and the number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for a position that deterrence does not exist, since the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent. The major challenge for future research is to estimate the magnitude of the effects of different sanctions on various crime types, an issue on which none of the evidence available thus far provides very useful guidance.

Daniel Nagin makes the same point more concisely in a separate study made for the U.S. Panel:⁶

...despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect. Perhaps more important, the evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist.

Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence, which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis.

Ezzat Fattah (1976) reached similar conclusions in a study undertaken for the Law Reform Commission of Canada.

Professor Douglas Cousineau of Simon Fraser University reviewed the latest research literature for the Commission. His conclusion is even more skeptical than Nagin's:⁷

Drawing upon some nine bodies of research addressing the deterrence question, we contend that there is little or no evidence to sustain an empirically justified belief in the deterrent efficacy of legal sanctions. However, we go beyond a review of this literature and set out several arguments which document the mitigation of deterrent oriented legal sanctions.

Our thesis, however, is not confined to deterrence oriented legal sanctions. We suggest that many factors mitigate the effects of *any* legal sanctions intended to produce specific uniform outcomes.

One of the important mechanisms that mitigate and even nullify the deterrent effects of legal sanctions is, according to Cousineau, plea bargaining.

These general appraisals are either negative or they caution us against any dogmatic belief in the ability of legal sanctions to deter. There are however a few general statements that can be made with confidence.

- a) Even if there seems to be little empirical foundation to the deterrent efficacy of legal sanctions, the assertion that the presence of some level of legal sanctions has no deterrent effects whatsoever, has no justification. The weight of the evidence and

the exercise of common sense favour the assertion that, taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.

- b) The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that “law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of the problem (Donelson, 1985; 221-222). Similarly, it is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.
- c) The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research. In his extensive review of studies on deterrence, Beyleveld (1980; 306) concluded that “recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)” and that “inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations”.
- d) Finally, the efficacy of a threat is dependent upon its being known. If, for instance, the certainty of punishment is the cornerstone of deterrence, punishment must be perceived by potential offenders to be fairly certain in order to produce its effects. This implies, first of all, that deterrence has to rest, at least partly, on mystifications. It has been noted that a very small proportion of all offenders are sentenced. Thus the criminal justice system is led to bark louder than it can bite in order to sustain the public's belief in the certainty of legal sanctions. Second, given the present tendencies in the media, it can be doubted that the criminal justice system actually is able to sustain a belief in the certainty of punishment. The news media tends to report sentences that are unusual in some way. Most of the time this means unusually lenient (see Chapter 4). Furthermore, offences receive far more attention than sentences: crimes are more dramatic than sentencing hearings. Finally, the media regularly reports that the clearance rates for the majority of criminal offences are quite low, thus undermining any belief in the certainty of being caught and sentenced. In his most recent treatise on sentencing, Professor Nigel Walker aptly summarized this predicament:⁸

What is fairly clear is that the news media's choice of what to report about clear-up rates and sentences is not designed to further a policy of general deterrence; and that it is only occasionally possible to make deliberate use of newspapers, television or radio for this purpose, usually by paying for the publicity. This fact, coupled with the vagueness of our knowledge about the

operation of deterrents, should dissuade both legislators and sentencers from being very optimistic about this function of penalties.

To summarize: it is plausible to argue that a general effect of deterrence stems from the mere fact that an array of sanctions are known to be imposed with some regularity. However, it can be questioned whether legal sanctions can be used beyond their overall effect to achieve particular results (e.g., deterring a particular category of offenders, such as impaired drivers). In other words, deterrence is a general and limited consequence of sentencing. It is not a goal that can be attained with precision to accommodate particular circumstances (e.g., to suppress a wave of breaking and entering dwelling houses).

2.2 Rehabilitation

In 1974, Robert Martinson published an article under the title “What Works – Questions and Answers About Prison Reform”. This paper created an awakening and, although Martinson was himself more cautious in his conclusions, his study was held to mean that *nothing works* in correctional rehabilitation. In a more detailed investigation, Lipton, Martinson and Wilks (1975) drew very pessimistic conclusions about the possibility of using corrections – and particularly imprisonment – to achieve the rehabilitation of criminal offenders. This negative assessment was thought to be definitive and it effectively marked the downfall of rehabilitation as a living ideal in corrections. The U.S. Panel on the Rehabilitation of Criminal Offenders confirmed this diagnosis:⁹

The Panel concludes that Lipton, Martinson and Wilks were reasonably accurate and fair in their appraisal of the rehabilitation literature...Two limitations, however, must be applied to their conclusions: first, inferences about the integrity of the treatments analysed were uncertain and the interventions involved were generally weak; second, there are suggestions to be found concerning successful rehabilitation efforts that qualify the conclusion that “nothing works”.

Despite voicing these reservations, the Panel’s main conclusion was unfavourable to rehabilitation:¹⁰

There is not now in the scientific literature any basis for any policy or recommendations regarding rehabilitation of criminal offenders. The data available do not present any consistent evidence of efficacy that would lead to such recommendations.

Both *The Criminal Law in Canadian Society* (CLICS) and the proposed Criminal Law Reform Act, 1984 (Bill C-19) were highly critical of the ideal of rehabilitation. According to CLICS, “it is...generally agreed that the system cannot realistically be expected to rehabilitate unwilling offenders” (p. 28). Bill C-19 stated unequivocally in subsection 645 (3)(g):

a term of imprisonment should not be imposed, or its duration determined solely for the purpose of rehabilitation.

The very limited success of rehabilitation was due to the fact that it was thought possible to achieve this goal mainly through incarceration and indeterminate sentences. Rehabilitation is no longer linked to custodial sentences. In influential books, D.A. Thomas (1970) and Paul Nadin-Davis (1982) provide a similar description of what they call the primary sentencing decision: choosing between two sentencing goals, depending upon the circumstances of the case and of the offender. The judge may elect to pursue the goal of general deterrence; in this case he will generally resort to a custodial sentence or a fine and impose the prevailing tariff. He or she may also decide that the offender can be rehabilitated and impose an individualized sentence, which should be neither a custodial sentence nor a fine. It follows from this line of reasoning that the individualization of sentences should not be used to justify disparity in custodial terms (or in the amount of fines). The individualized sentence is a tool for the rehabilitation of offenders and this goal ought to be achieved through non-custodial programs. Actually, as noted above, Bill C-19 expressly forbade the imposition of imprisonment solely for purposes of rehabilitation. Both Thomas and Nadin-Davis stress that equity requires judges to adopt a uniform approach in individualizing their sentences. The legitimate practice of individualizing non-custodial sentences should not be used to cover up evidence of unwarranted disparity in the imposition of custodial sentences.

2.3 Incapacitation

Two general remarks must be made with regard to incapacitation. First, this goal can be achieved primarily by custodial sanctions. Consequently, this goal cannot be selected as the overall purpose of the sentencing process, because the process encompasses an array of non-custodial sanctions. Second, it appears that countries such as the United States, which have the highest rates of incarceration, are also afflicted with the highest crime rates. To respond that this situation is only natural and that where there is more crime, it should be expected that there will be more imprisonment, will not suffice. This answer twists around exactly what is claimed by the advocates of incapacitation. Their claim is not that a high level of crime generates an increase in the rate of incarceration. It is the opposite: a high rate of incarceration (of incapacitation) should lead to a *decline* in the amount of criminality. This is precisely what is *not* happening in countries like the United States, which incarcerate more offenders than any other industrial society, except the Soviet Union.

The literature on sentencing makes a distinction between collective and selective incapacitation. "Collective incapacitation" refers to an incapacitative strategy that imposes a prison term on *all* persons convicted of a type of offence, usually broadly defined to encompass several crimes (e.g., any kind of burglary or any kind of assault). "Selective incapacitation" refers to an incapacitative policy involving an attempt to predict which offenders are more likely to recidivate; these "dangerous" offenders should then receive a harsher custodial sentence.

Although in theory, the effects of incapacitation can be estimated more precisely than the effects of deterrence, the research picture is not that different. The U.S. Panel on Research on Deterrent and Incapacitative Effects (1978) first acknowledges the existence of an incapacitative effect. This admission is, however, no more than an expression of common sense:¹¹

As long as there is a reasonable presumption that offenders who are imprisoned would have continued to commit crimes if they had remained free, there is unquestionably a direct incapacitative effect.

As soon as the Panel tries to go beyond this general statement and attempts to estimate the magnitude of the effect of collective incapacitation on crime rates, it must rely on extremely hypothetical models, which are as yet more adequate for theoretical simulations than actual numerical appraisals.¹²

If the actual numbers generated by statistical analyses of the effect of collective incapacitation cannot be taken as exact, basic patterns revealed by these studies tend to be more reliable. Hence, one of the less problematic statements about collective incapacitation is that it should be directed toward violent offenders. Any attempt to use this strategy against offenders convicted of property crimes would have a marginal effect upon the crime rates only at the cost of unreasonable increases in the prison population.

Since the 1978 publication of the report of the Panel on Research on Deterrent and Incapacitative Effects, concern over the large increase in the size of prison populations has increased and the limitations of collective incapacitation have become all the more obvious. Until very recently, the only incapacitative strategy seriously considered was a form of selective incapacitation. This approach gained momentum after the publication by Greenwood and Abrahamse (1982) of a widely discussed report entitled *Selective Incapacitation*. Even if one does not doubt that a properly implemented policy of selective incapacitation would affect crime rates without increasing, beyond present capacity, the number of persons incarcerated, the problem of predicting future delinquent behaviour and thus of identifying the most dangerous offenders is *yet unsolved* (von Hirsch, 1985; Webster, Dickens and Addario, 1985). Such a policy cannot be implemented without first solving adequately the prediction problem. Greenwood and Abrahamse themselves have expressed several caveats regarding the significance of this research.¹³

Finally, a third variant of incapacitation was developed by Jacqueline Cohen in 1983. In his latest book, von Hirsch (1985) discusses favourably this last alternative. It is called "categorical incapacitation" and it falls somewhere between collective and selective incapacitation. Instead of incarcerating indiscriminately all persons convicted of serious offences or attempting to select dangerous individuals for imprisonment, Cohen has proposed that we try to estimate the probability of recidivism associated with the commission of precisely-defined offences (a particular type of robbery, for instance); we would then incarcerate those persons convicted of this offence. Needless to say, this nascent strategy is still very tentative. Furthermore, the problem of identifying the high-risk categories of offences may be just as difficult to

resolve, if not more, than predicting individual behaviour. Indeed, since categorical incapacitation implies the imprisonment of whole groups of offenders and not merely dangerous individuals, the certainty of the prediction of a particular high-risk category of offence must match the potential harm that it would create if it were incorrect.

2.4 Retribution

Since it stresses the obligation to punish persons guilty of a crime, retributivism is oriented more towards past blameworthy behaviour than towards the consequences of punishment in the future. Thus, as was stressed in section 1.1, retributivism provides a moral ground for imposing sanctions rather than a purpose which they can strive to achieve (although it can be violated, a moral ground is not, properly speaking, something that can be “achieved” with various degrees of success). It is therefore problematic to treat retribution as a goal and to estimate to what extent it is achieved. However, such an appraisal would require us to note that, strictly understood, retributivism implies that a sanction ought to be imposed upon *all* offenders. As we know that only a small percentage of offenders is brought to justice, it follows immediately that the criminal justice system fails to a very large extent to achieve what is implied by retributivism.

Retributivism lends itself more suitably to an assessment of its value as a justification of punishment. As previously mentioned, it has been debated by legal scholars whether any attempt to justify punishment does not ultimately fall into a vicious circle.¹⁴ This circularity appears to be grounded in the notion of punishment itself. We have argued in Chapter 5 that the notions of crime and punishment are both involved in their respective definition and that circularity in the definition of punishment was in consequence unavoidable. The interrelated nature of crime and punishment makes it equally difficult to justify the imposition of penal sanctions. This point can be made through an argument similar to the one used to show that definitions of punishment were circular.

The question is: “Why should we punish a person?”. An obvious answer is: “Because that person has done something wrong”. However, this answer raises a further issue: should we actually impose legal sanctions on individuals for any kind of wrongdoing (being discourteous, lacking table manners, cheating at cards)? Obviously not. Only those who are guilty of the most serious forms of wrongdoing should be punished. What precisely are these? They are labelled criminal offences. And what then, is a criminal offence? A criminal offence is a form of behaviour which is legally defined as subject to punishment. Such legal definitions vary across time (we do not burn witches anymore) and across countries. Finally, our original question – Why should we punish a person? – is given the uninformative answer: “Because that person has done something which we now believe requires punishment”.

It does appear that strict retributivism is flawed both as a goal of sentencing and as a justification for the imposition of criminal sanctions. This conclusion does not mean that all aspects of retributivism need be rejected. However, it implies that limits should be set upon the rigorous claims of strict retributivists. These claims do not rest on a secure foundation.

2.5 Denunciation

Denunciation of blameworthy behaviour is a goal of sentencing which is associated with retributivism. It has been advocated as a legitimate goal for sentencing in several of the reports published by the Law Reform Commission of Canada.¹⁵ In its brief submitted to the Commission, the Law Reform Commission of Canada stresses once again the importance of denunciation. Clearly, denunciation is a consideration which is of paramount importance for sentencing. However, it cannot be in itself the overall goal.

Denunciation is essentially a communication process which uses the medium of language to express condemnation. Hence, the French equivalent of the English word "information", as it is used in the Canadian *Criminal Code*, is "dénonciation" (see for instance, the definitions of "indictment" and "acte d'accusation" in section 2 of the *Code*; see also ss. 723-727).

The sentencing process has a dual nature. A sentence is, in a limited sense, a judicial pronouncement in court; more fundamentally, it designates a sanction which is applied to an offender. Denunciation is a goal which is much more germane to the first aspect of sentencing than to the second. Since the sanctions provided by the criminal law are obviously more severe than verbal criticism, one would need to over-dramatize the meaning of denunciation to make it the corner-stone of sentencing.

The degree to which the goal of denunciation can be achieved is dependent upon the publicity of the condemnation. It has been stressed already that crime gets much more media coverage than sentencing and that, generally speaking, there is wide discrepancy between the public's knowledge of criminal sanctions and their actual features.

One last remark. Walker and Marsh (1984) conducted an experiment in England to verify whether there is a relationship between the degree of blame attached to an offence by members of the public and their knowledge of the severity of sentences for that particular offence. In Nigel Walker's own words "The results did not provide any support for the belief that the disapproval levels of substantial numbers of adults were raised or lowered by information about the sentence, or about the judge's view" (Walker, 1985; 102).

The Commission did not attempt to replicate this experiment in Canada. However, our research on public opinion supports Walker and Marsh's findings. One question in a public opinion survey involving maximum penalties concerned their effect upon public seriousness ratings. To what extent are

views of seriousness affected by the maximum penalty prescribed by the *Criminal Code*? The recent change in maximum penalties for impaired driving provided the opportunity for a natural experiment. All respondents were asked to rate (on a 100-point scale) the seriousness (relative to other crimes) of impaired driving. Half of the sample were first told that the new maximum penalty was five years. The other half were told nothing. We know from earlier research that most people estimate the maximum to be substantially less than five years. If public views of seriousness are affected by maximum penalties, one would expect the group receiving the maximum penalty information to provide higher ratings of seriousness. But they did not. The average ratings made by the two groups were strikingly similar: 68.9 and 68.2. This result is consistent with a smaller in-depth experiment conducted by the Commission, as well as with research in the United Kingdom. Public views of the seriousness of offences appear to derive more from other sources (e.g., perceptions of harm, intent, etc.) than the severity of statutory maximum penalties or the harshness of the sentence actually imposed in court.

2.6 Just Deserts

The just deserts perspective, which is now one of the main influences on sentencing theory, has often been viewed as a recasting of retributivist arguments, namely that an offender deserves punishment to restore a balance which played in his favour when he flouted the rules by which other citizens abide. The view that “just deserts” is simply a rediscovery of retributivism is incorrect. Andrew von Hirsch has always argued that if punishment was a useless instrument for controlling crime, one could not justify its existence on purely retributivist grounds. Without the support of utilitarian considerations, retributivism becomes a circular argument or is reduced to the blind assertion that crimes ought to be punished. Some of von Hirsch’s clearest formulations of this point have already been quoted in section 1.1 of this chapter. There are three aspects of the just deserts perspective which are crucial for developing a sentencing rationale:

- a) A distinction between the question of the allocation of sanctions – how much sanction? – and the issue of their justification – on what ground can we impose sanctions and for what purposes?
- b) The assertion that the principle of proportionality or commensurate deserts must be given priority in deciding the issue of the allocation of a quantum of sanction.
- c) The assertion that pure retributivism cannot provide the justification for sanctions and that their legitimacy must rest both on grounds of morality and social utility (crime prevention).

These aspects of just deserts theory have already been discussed. It has been recognized that they should be incorporated in the formulation of a sentencing rationale.

2.7 Summary

This review of justifications and goals has resulted in conclusions which conflict with normal expectations. In principle, we should have found that *retributivism's* strength was providing a *general justification* for sanctions whereas its weakness lay in the fact that its different features did not lend themselves to a precise numerical assessment. In theory, *utilitarianism* is the opposite: it is weak with regard to the provision of a general justification and strong in allowing our *exact appraisal* of its success.

To the contrary, we have found that the only assertion about the current utilitarian goals that was not undermined by the results of research was relative to the existence of some *general effect* of deterrence and incapacitation, the magnitude of which could not be precisely estimated. This finding concurs with a view expressed in *The Criminal Law in Canadian Society*:

It is now generally agreed that the system cannot realistically be expected to eliminate or *even significantly reduce crime*. (p.28, emphasis added).

With regard to retributivism, we have argued that it *does not* provide a *general justification* for the existence of punishment but that just desert principles, which are akin to retributivism, might provide a rationale for estimating the *quantum* of deprivation to be inflicted on criminal offenders.

Without being bleak, this picture is disquieting because it seems that generality and precision are wrongly allocated. What we need is a general justification of punishment and a precise estimation of the performance of the criminal justice system. According to research, what we have is the exact opposite, namely a limiting just deserts principle for grading the amount of punishment to be visited on offenders and a general belief, grounded in common sense, that the penal system has some preventive effect (through deterrence and incapacitation) on rates of crime.

This predicament entails several things. First of all, it means that uncertainty is not the exception but rather the general rule in attempting to solve penal problems. We are not in a state of ignorance but we lack fundamental certitudes: this is the context in which decision-making will have to occur.

Second, a context of uncertainty grants considerable discretion to decision-makers; decisions may be made without being constrained by a large number of commonly-acknowledged facts. For this same reason, however, decisions should be made in a cautious and principled way. Any tension arising between the freedom enjoyed by the decision-makers, which entails boldness in their resolutions, and between the need for prudence, which may lead them into diffidence, ought to be resolved by stressing the fact that decision-making is an *ongoing process*. This process can be determined by priorities but it should also be flexible and enduring enough to allow for changes. The upshot of these remarks is that all sentencing policy decisions cannot be finalized at the same time. There is a strong need for a permanent body which would build upon the work of this Commission and update its policies.

It also appears that we know much more about what punishment cannot achieve (e.g., rehabilitation of unwilling offenders) than what it can accomplish and what justifies its being. With regard to the actual performance of the penal system and to its legitimacy we must rely on a mixture of knowledge, reasonable beliefs and strong emotions. This situation suggests that the need for restraint repeatedly called for since the early seventies by the Law Reform Commission of Canada is very real. Punishment, which involves pain and deprivation, should be used all the more moderately since we are uncertain of its benefits either to society or to its individual members.

Finally, one might wonder, in view of the limited capability of the sentencing process to prevent crime, why crime-preventive goals like deterrence, incapacitation and rehabilitation play such a prominent part in jurisprudence. In a perceptive article on retributivism, Mackie (1982) writes:

The paradox is that, on the one hand, a retributive principle of punishment cannot be explained or developed within a reasonable system of moral thought, while, on the other hand, such a principle cannot be eliminated from our moral thinking.

Interestingly, Mackie infers from the existence of this paradox that justifications for punishments are as deeply-rooted in human emotions as in the human mind. Even if punishment cannot ultimately be justified, it apparently satisfies a strong desire, seated both in moral thinking and human emotions, and it cannot be renounced. There is consequently a natural tendency to compensate for the limits of retributivism by attributing to penal sanctions an efficiency in preventing crime which they do not really possess.

3. Goals and Principles of Sentencing

3.1 The Protection of the Public

The most frequently invoked purpose of sentencing is the protection of the public (and/or society). Eighty-eight percent of the judges surveyed by the Commission answered that protecting the public was the overall purpose of sentencing. This is not unexpected in view of the fact that, since 1938, all major commissions reporting on the penal system have followed the lead of the Archambault Commission in asserting that the protection of the public was the over-riding purpose of the criminal law. This Commission has tried to assess to what degree the traditional goals of sentencing have been achieved. It may then appear surprising that it does not present a similar appraisal of the extent to which the sentencing process succeeds in protecting the public. This apparent reluctance can easily be explained.

The notion of protecting the public is fraught with ambiguity. This ambiguity is explicitly acknowledged by Nadin-Davis (1982) in his extensive study of the Canadian Courts of Appeal. After stating that Courts of Appeal do not frequently venture into the “murky waters” of sentencing aims, Nadin-Davis goes on to say (p. 27):

Where they do venture into these murky waters, their statements are often misleading and confusing...The oft-quoted case of *Morrisette et al.*, despite its many merits, provides a good example of this confusion. Chief Justice Culliton there said:

As has been stated many times, the factors to be considered are:

- (1) punishment;
- (2) deterrence;
- (3) protection of the public; and
- (4) the reformation and rehabilitation of the offender.

The problem lies in point (3), "protection of the public". If the phrase is being used in the sense of incapacitation, that is locking the offender away until he is "safe", then the only problem is the terminology. If, however, as seems more likely, the Chief Justice was using the phrase in the sense of the overall aim of sentencing, then factors (2), deterrence, and (4), reformation and rehabilitation of the offender, are not commensurate considerations but *means* of achieving the *end* expressed in the phrase, "protection of the public".

If then, the protection of the public is understood in its current meaning in the sentencing literature, it has already been reviewed under the heading of incapacitation. If this notion is understood in its widest sense, as the overall goal of sentencing, it becomes doubtful whether the success of the criminal justice system in protecting the public can be thoroughly assessed. The notion is too broad for empirical studies. In fact, there is an abundant research literature on deterrence, incapacitation and rehabilitation, but there are very few empirical studies using the notion of protecting the public in its wider implications.

The ambiguity which is illustrated by Nadin-Davis originates with the Archambault Report. After dwelling on the difficulty of formulating principles of penology, this report declares:

We believe, however, that we are on safe ground in stating that no system can be of any value if it does not contain, as its fundamental basis, *the protection of society*. (p. 8, emphasis in text)

It should be stressed that the protection of society is not said to be the overall goal of sentencing, but of the entire penal system. This introduces an element of great generality to the notion of the protection of society. However, the only sanction which is mentioned by the Archambault Commission's terms of reference is incarceration (in a penitentiary). Excepting three chapters dealing respectively with the prevention of crime, juvenile courts and young offenders, the Archambault Report, which is 32 chapters long, speaks only of incarceration.

Although it recognized that the aim of protecting the public can be furthered by the use of different sanctions, the original association between the protection of society and incapacitation was never broken by the sentencing literature, jurisprudence or by judicial practice.

R. v. Wilmott is one of the strongest assertions that "the fundamental purpose of any sentence of whatever kind is the protection of society".¹⁶ In this

judgment, Mr. Justice McLennan draws a distinction between absolute and relative protection of society; then he asserts that it is custody which provides absolute protection. In a series of experiments involving the determination of a sentence in hypothetical cases, Palys (1982; 127) found that the protection of the public was used by a majority of judges to justify the longest prison sentences.

The ambiguity surrounding the meaning of the protection of society is not a decisive consideration. It is however indicative of further difficulties in using this aim as the overall goal of *sentencing*. It must be emphasized that the difficulties which shall be raised occur in the context of making protection of the public the overall goal of sentencing itself. There are no serious objections to making protection of the public the overall goal of the criminal justice system as a whole.

3.1.1 Victims and the Protection of Society

Professor Irvin Waller has written a study of the role of the victim in sentencing (Waller, 1986). In the conclusion of his paper, he declares that "The root of the problem is the concept that crime is committed *only* against the Queen" (p.23). Professor Waller means that as long as it will be believed that offences are committed against abstract entities such as "the State" or "society" or "the general public", the plight of victims will not be fully acknowledged. Making the protection of society the overall goal of sentencing perpetuates a situation where the harm suffered by the victim is not explicitly recognized. Indeed, sentencing takes place only after an offender has been found guilty of an offence. Therefore, save for so-called victimless crimes, victimizing behaviour has *already* occurred when the sentencing stage is reached. Not only has it occurred, but it *must have occurred* for a sanction to be imposed. That only the guilty should be punished is one of the foundations of criminal justice. When it is proclaimed that the protection of the public is the overall goal of sentencing, what is really meant is that *other* members of the public will be protected from a particular offender or that the victim, providing of course that he or she is not dead, will be protected from *further* harm. That the victim has already suffered harm or loss of property and that to this extent he or she has not been afforded protection remains unsaid.

3.1.2 Limited Protection

It has been noted in the preceding chapter that the scope of sentencing is quite limited. Not only is there a large amount of crime that is unreported to the police, but of those offenders who are actually arrested, only a minority are eventually convicted and sentenced. Notwithstanding the success enjoyed by the police in implementing crime prevention programs, the protection that is afforded the public by the courts is quite restricted in its nature.

The John Howard Society of Alberta made this point forcefully in its submission to the Commission

Prisons do keep the small proportion of those offenders who are actually apprehended and convicted out of circulation for specified periods. However, according to the latest survey by the Department of the Solicitor General of Canada, nearly 60% of serious crimes, ranging from sexual assault and robbery, to burglary, theft and vandalism, are not even reported to the police. In seven selected Canadian cities in 1981 nearly one million out of an estimated 1,600,000 indictable crimes remained unreported. Of those that *are* reported, the "clearance" rate by conviction is unlikely to exceed 20%, and many convictions do not necessarily mean jail. Thus, it can readily be perceived that over 95% of indictable offences are not punished by jail terms at all. In these circumstances the amount of "protection" afforded to the community by our prisons is limited in the extreme.

It would be erroneous to believe that this situation can be drastically modified. Even if we could allocate unlimited budgets to law enforcement, we would have to consider that any crime control strategy which is palatable to a democracy results in leaving a large amount of crime unpunished.

3.1.3 The Need for a Specific Goal

The goal of protecting the public cannot be seen as specific only to the sentencing process. This notion lacks precision in at least two ways. First of all, as understood in its ordinary sense, the notion of protecting the public is so general that several government departments and agencies could claim it as the overall purpose of their activities. Obvious candidates would be the Departments of Agriculture (food inspection), Environment, Health and Welfare, Justice, National Defence, the Ministry of the Solicitor General, the Ministry of State for Small Business, Emergency Planning Canada, the Canadian Coast Guard and several Commissions (e.g., the Privacy Commission). This list could be made much longer just by perusing the list of departments and agencies in the Government of Canada and ascertaining their duties and responsibilities.

Second, while there is no denying that sentences do have protective effects, there are no specific features of the concept of protecting the public which imply that the courts have the prime responsibility of achieving this goal. Due to the general nature of this goal, the protection of the public might conceivably be seen as the overall purpose of the *whole* criminal justice system (police, courts and corrections). This is actually how it has been viewed by all major commissions since the Archambault Commission. There is little about the notion, in its general sense, to suggest that it is especially connected with court sentencing activity. In fact, one associates the goal of protecting the public more readily with police work (i.e. the apprehension and charging of suspected criminals). Intuitively, at least, one would rather resort to a security guard than to a sentencing judge to protect one's home.

According to the Commission's mandate, its recommendations should reflect principles asserted in *The Criminal Law in Canadian Society*. It is said in this policy statement that the overall purpose of the whole criminal law is

two-fold and that it should blend “security” goals, such as the protection of the public, and “justice” goals such as equity. If one formulates a purpose for the whole criminal justice system (criminal law), we argue that it is possible to issue a wide-ranging statement which sets out to reconcile pragmatism with morality. If, however, we wish to focus on sentencing and hence, consider each component of the criminal law worthy of consideration (e.g., the police, the courts and corrections), it becomes clear that justice goals are far more specific to the courts, whereas security objectives are more akin to police work and corrections. Packer (1968) draws a distinction between “crime control” and “due process” models in criminal law, which has now become classic; this distinction reflects the view that the courts’ core mandate is to ensure that justice goals prevail. With regard to budgets, personnel and facilities, police and corrections are the main constituents of the criminal justice system. When the criminal justice system is considered in its entirety, it would then seem natural to infer that the balance of goals is tipped towards security goals. However, if one refers specifically to the sentencing process as it is carried out by the courts, then it is justice goals which should be seen as having priority.

3.1.4 Realistic Expectations

It is sometimes argued that sentencing is the climax or the hub of the criminal law and that consequently its overall purpose should be the same as that of the entire criminal justice system. The Commission believes that combining the purpose of the whole system with the overall goal of one of its components can lead to serious misunderstandings.

It generates unrealistic expectations about the effects of sentencing which are mistakenly identified with the total output of the criminal justice system. Being thus singled out, the sentencing process is made accountable for the entire criminal law, over which it has a very limited control.

The Commission’s recommendation to distinguish between the overall goal of the criminal justice system and the specific goal of sentencing would prevent such misunderstandings from arising. By making protection of society the overall goal of the criminal law, this recommendation increases the possibility of achieving it to a significant extent. Not only is the whole system more powerful than any of its components, but the criminal justice system is now reaching out to the public to have it participate in its own protection. It is only through a partnership between criminal justice and the public that the latter will be effectively protected.

3.2 Respect for the Law

If criminal sanctions serve no useful social purpose at all then we may as well dispense with them. Unfortunately, we do not seem as yet able to assess with any significant degree of accuracy the effects of sentencing.

On close examination, the nature of the criminal law itself might offer clues as to how we should escape from the above predicament. Contrary to what the general public and a large number of experts believe, the *substantive* part of the criminal law, as *it is actually spelled out*, does not expressly enumerate any “prohibitions” or any “obligations”. One does not find the phrases “Thou shalt” or “Thou shalt not” nor any of their modern equivalents in the *Criminal Code*.

Our written criminal law simply sets out a description of criminal offences, followed by their corresponding penalties. Needless to say, prohibitions are a by-product of criminal law – but that is quite different from asserting that the criminal law establishes “a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct” (Canada, 1982; 57). It is crucial to realize that sentencing is not an extension of the criminal law, nor even its “other side” (enforcement). It is exactly the other way around: in its formulation, the criminal law is nothing more or less than a blueprint for sentencing. Hence, the actual imposition of sentences determines which part of the law is living and which part is not.

The same point can be made in a more concrete and revealing way. The criminal law defines criminal offences. Let us suppose that someone would ask: “What if I commit what you say are crimes?”. Let us further imagine that the State answers: “Nothing happens, insofar as criminal justice is concerned”. Although the sequence of events following this answer is not difficult to forecast, attention must be paid to details:

- a) Those people who refrain from committing serious crimes only because of their fear of punishment, would engage in criminal activity once the threat of sanctions is removed.
- b) However, research has shown that the majority of the members of the community do not adopt criminal careers for reasons that are on a different level than the simple fear of punishment. (For most people the social environment has built up in them a sense that they should not get involved in serious crime because it is wrong to do so). For these law-abiding individuals, the spectacle of the impunity enjoyed by wilful offenders would have one of two consequences. They would become demoralized, and this demoralization would lead them to deviancy. Or, the alternate and more predictable scenario is that the majority of law-abiding people would become outraged and vengeful. They would sound a return to private justice and vigilantism, thus signifying a breakdown of law and order as it is known in our society.

The important point made by this description is the following: the majority of people do not need to be deterred from serious criminal behaviour (nor do they need to be rehabilitated or incapacitated). *What is imperative is that they should not be demoralized by their perception that there is no accountability for seriously blameworthy behaviour.* To publicly allow a known offender to get away with impunity would undermine the point of

having rules in the first place. The over-riding concern should be that members of a community are accountable for behaviour which is victimizing and which flouts the basic values held by society. The notions of potential sanctions and accountability are essentially the same. Hence, the outline of the overall purpose of sentencing: the assertion that people are held accountable by sanctions for behaviour which betrays core values of their community.

6.1 The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

The proposed purpose is not to be confused with deterrence. It rests on the premise that the majority of the population need to be spared more from the outrage and demoralizing effect of witnessing impunity for criminal acts than to be deterred from indulging in them. It would, however, be a mistake to infer that deterrence *would not* result from the imposition of sanctions as a consequence of holding the members of the community accountable for their wrongdoing. The Commission's formulation implies that the fundamental purpose of sentencing is to impose just sanctions to impede behaviour denounced by the criminal law. Promoting respect for the values embodied in the law would then strengthen the conviction in citizens that they can be made to account for unlawful behaviour, and that the costs of such behaviour outweigh the anticipated benefits.

The Commission's recommendation reflects in part a theory of sanctions proposed by Hyman Gross (1979; 400-401):

According to this theory, punishment for violating the rules of conduct laid down by the law is necessary if the law is to remain a sufficiently strong influence *to keep the community on the whole law-abiding*...Without punishment...the law becomes merely a guide and an exhortation to right conduct...Only saints and martyrs could be constantly law-abiding in a community that had no system of criminal liability...The threats of the criminal law are necessary, then, only as part of a system of liability ensuring that those who commit crimes do not get away with them. The threats are not laid down to deter those tempted to break the rules but rather to maintain the rules as a set of standards that compel allegiance in spite of violations...(emphasis added).

The important point made by Gross is that sentencing should not claim anymore to intimidate all offenders but more modestly, and also much more importantly, to keep the community *as a whole* law-abiding. In other words, it aims at preventing any serious undermining of our system of criminal laws.

The fundamental purpose that we have just outlined would overcome to a significant degree the difficulties of formulating a sentencing rationale as they have been identified in the course of this chapter.

First of all, the goal that we have provided satisfies the principle that sentencing is only justified if it serves a useful social purpose. Preventing criminal behaviour from systematically occurring is clearly beneficial to society. However, inhibiting criminal behaviour is here seen more as a general effect of the operation of the sentencing process than as the specific outcome of a particular sentencing strategy such as deterrence, incapacitation or reformation. This is in line with the results of research on the degree to which utilitarian goals are achieved. As we have said at length, evaluation research shows that criminal sanctions produce their results in a way which does not yield itself to precise measurement.

Second, the fundamental goal proposed by the Commission can actually be achieved by the sentencing process. Sentencing is not committed to eradicate crime but to prevent it increasing beyond a threshold where freedom, peace and security can no more be enjoyed on the whole by a community.

In contrast with the Declaration of Purpose and Principles of Sentencing contained in the Criminal Law Reform Act, 1984 (Bill C-19) (see Appendix E), the fundamental goal recommended by this Commission has a built-in relationship with the principles of sentencing. If the fundamental purpose of sentencing is to preserve the authority of the law and to promote respect for it through the imposition of *just sanctions*, it follows that the principle of proportionality is given highest priority. The recommended goal also being realistic, it can be achieved in accordance with the principle of restraint, without being dependent upon the use of the more drastic alternatives. Finally, in recognizing that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice, the Commission's formulation of the overall goal of sentencing provides a secure foundation for such principles as equity, predictability and totality.

Finally, in stating that protection of society is the overall goal of the entire criminal law, the Commission dispels a long-standing equivocation and strengthens the requirement of protecting the public by putting it at the level where it belongs.

4. The Declaration of Purpose and Principles of Sentencing

The results of all the previous analyses are embodied in a Declaration of Purpose and Principles of Sentencing. There is no need to comment at length on the Declaration, since it is the outcome of what has been previously said in this chapter. It is, however, important to realize that the Declaration formulated by this Commission is different in one important respect from a similar Declaration embodied in the former Bill C-19. The Declaration recommended by the Commission establishes a clear order of priority with regard to its sentencing policy. The fundamental goal of sentencing takes precedence over the content of all other sections of the Declaration, with

regard to sentencing. As it is explicitly stated in sub-section 4(a), proportionality is the paramount consideration governing the determination of the sentence. There is no order of priority between the considerations listed in sub-section 4(d). However all these considerations are subject to the application of the sentencing principles formulated in sub-sections 4(a), (b) and (c). They must also be invoked in strict conformity with the fundamental goal of sentencing.

6.2 The Commission recommends the following Declaration of Purpose and Principles of Sentencing be adopted by Parliament for inclusion in the *Criminal Code*:

Declaration of Purpose and Principles of Sentencing

1. Definitions

“Sentencing” is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.

“Sanction” includes an order or direction made under subsection 662.1(1) (absolute or conditional discharge); subsection 663(1)(a) (suspended sentence and probation); subsection 663(1)(b) (probation with imprisonment or fine); sections 653 and 654 (restitution); subsections 646(1) and (2), section 647 and subsection 722(1) (fine); subsections 160(4), 281.2(4), 352(2) and 359(2) (forfeiture); subsections 98(2) and 242(1) and (2) (prohibition); subsection 663(1)(c) (intermittent term of imprisonment); and a term of imprisonment.

(Note: The definition of sanction is intended to include all sentencing alternatives provided for in the *Criminal Code*. Section numbers refer to *Code* provisions as they currently exist).

2. Overall Purpose of the Criminal Law

It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

3. Fundamental Purpose of Sentencing

It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

4. Principles of Sentencing

Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:

- a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.**
- b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.**
- c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:**
 - i) any relevant aggravating and mitigating circumstances;**
 - ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;**
 - iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;**
 - iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;**
 - v) a term of imprisonment should be imposed only:**
 - aa) to protect the public from crimes of violence,**
 - bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,**
 - cc) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.**
- d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:**
 - i) denouncing blameworthy behaviour;**
 - ii) deterring the offender and other persons from committing offences;**

- iii) separating offenders from society, where necessary;
- iv) providing for redress for the harm done to individual victims or to the community;
- v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

5. List of Recommendations

- 6.1 The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.
- 6.2 The Commission recommends the following Declaration of Purpose and Principles of Sentencing be adopted by Parliament for inclusion in the *Criminal Code* (see full text pp. 153-155).

Endnotes

¹ See von Hirsch (1983a; 211).

² This quotation of Kant is taken from *The Metaphysical Elements of Justice*, which forms Part I of the *Metaphysics of Morals*. The exercise of retribution is called a "categorical imperative" by Kant. These are ultimate principles, which cannot be justified further.

³ Von Hirsch has subsequently abandoned Kantian justifications for retributivism. It was already quite clear in *Doing Justice* (von Hirsch, 1976) that the imposition of sanctions had to result in *some* tangible social benefits. In the quotations given in the text, von Hirsch uses the expression "crime prevention" in the widest sense – decreasing the occurrence of crime; he does not specifically refer to proactive police work or to community involvement in crime control, which are narrower forms of "crime prevention".

⁴ This fact was clearly established by a review of the literature on sentencing disparity which was undertaken by Dr. Julian Roberts (see *Roberts, 1985*). It is frequently alleged to explain the disparate results of sentencing exercises on fictional cases, as they were conducted, for example, by Palys and Divorski. The result of these exercises is discussed in the report entitled *Beyond the Black Box* (Palys, 1982).

⁵ See Blumstein, Cohen and Nagin (1978; 7).

⁶ The two quotes from Nagin are taken from Blumstein, Cohen and Nagin (1978; 135 and 136).

⁷ See *Cousineau (1986)*; (viii).

⁸ See Walker, (1985; 100).

⁹ See Sechrest, White and Brown (1979; 5).

¹⁰ See Sechrest, White and Brown (1979; 34).

¹¹ See Blumstein, Cohen and Nagin (1978; 9).

¹² "Models exist for estimating the incapacitative effect, but they rest on a number of important, and as yet untested, assumptions. Using the models requires adequate estimates of critical, but largely unknown, parameters that characterize individual criminal careers. The most basic parameters include estimates of individual crime rates and of the length of individual criminal careers as well as of the distribution of both of these parameters across the population of criminals. Because the crimes an individual commits are not directly observable, these parameters are extremely difficult to estimate." (Blumstein, Cohen and Nagin, 1978; 9-10).

¹³ "The reader should recognize that our analysis of selective incapacitation was subject to several limitations. We relied on self-reported retrospective information from incarcerated offenders in only three states. Among these states, the pattern of offence rate varied considerably. At the very least, our work should be replicated in different sites, using prospective data obtained from both surveys and arrest histories. Additionally, the critical assumptions of the model should be tested. Specifically, are there any replacement or career extension effects of incarceration that would tend to reduce the estimated crime reduction effects? Are offence rates stable over time? Moreover, the incapacitation model presented here should be improvised to handle multiple offence types and more complicated sentencing policies." (Greenwood and Abrahamse, 1982; xx-xxi).

¹⁴ "Thus, while strong retributivist theories are the kinds of theories that justification of punishment requires, such theories do not appear to contain a set of moral arguments sufficiently sound, unambiguous, and persuasive upon which to rest the general justifiability of punishment." (Wasserstrom, 1980; 146).

¹⁵ See, for example, Law Reform Commission of Canada (1977), *Guidelines: Dispositions and Sentences in the Criminal Process*; and Law Reform Commission of Canada (1974), *The Principles of Sentencing and Dispositions*.

¹⁶ *R. v. Wilmott* [1967] 1 C.C.C. 171, at 177.

Part II

The Proposed Reform

Chapter 7

General Introduction

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Chapter 7

General Introduction

This introduction to the Commission's specific recommendations attempts to explain the principles which guided our deliberations and upon which we based our approach to the development of a sentencing policy. In other words, it describes what it is that we have sought to accomplish. The sentencing policy formulated by the Commission reflects the following concerns which are listed not in order of priority, but to provide a logical flow of discussion.

1. An Integrative Approach

As has already been pointed out in Chapter 1, of the many groups that have examined criminal law issues, the Canadian Sentencing Commission is the first with the specific mandate to examine the whole sentencing process including the determination of sentences. It is not, however, the first commission to make recommendations in the area of sentencing. Although there have been some important changes over the past 100 years in the criminal law relating to such matters as appeals, early release, electronic surveillance and bail as well as to specific offences such as sexual assault or impaired driving, there have been no fundamental changes to the sentencing structure itself. The enduring character of our penalty structure is illustrated by the fact that the hierarchy of maximum penalties in the *Criminal Code* has remained virtually unchanged for close to a century. The current maxima of two years, five years, seven years, ten years, fourteen years and life, date back to 1892. Other maximum terms of imprisonment provided in the *Code* at that time, such as a three year maximum penalty, have since been deleted.

Part of the reason for the absence, to date, of a comprehensive review of our sentencing policy and penalty structure has been the complexity of the sentencing process and its interaction with other parts of the criminal justice system. Changes to one part of that process imply a need to modify other parts. One might well effect a minor change such as raising the minimum sentence for a particular offence without seriously jeopardizing other components of the system. However, any more ambitious or substantive modification introduced to solve problems in one area of sentencing would impact upon and conse-

quently necessitate a systematic review of all components of the sentencing process.

The scope of the Commission's mandate implies that proposals for reform should encompass a wide range of issues and further, that they should address the structure of the sentencing process. Therefore, it was necessary to adopt an integrative approach in formulating and recommending a sentencing policy for Canada.

The recommendations relating to each of the major tasks assigned to the Commission by its terms of reference are described in detail in the chapters which follow. Although each chapter deals with a specific topic, the Commission's recommendations cannot be read independently of one another. They were formulated as part of a comprehensive sentencing package. Focusing on one set of recommendations to the exclusion of others would lead to an incomplete understanding of the Commission's sentencing policy. In other words, in developing specific recommendations, the Commission was always aware of the degree to which its proposals were interdependent. However, we must stress that an integrated sentencing package does not mean that rejection of one set of recommendations necessarily implies automatic dismissal of all others. Individual elements of our recommended sentencing policy can be modified; however, because the package represents a synthesis of various components, changes to one area may necessitate alterations to others.

In a similar vein, it is important to realize that an assessment of the meaning and anticipated impact of one set of recommendations can only be made in the context of all the other proposals. There is an implicit recognition in the Commission's terms of reference that the sentencing process includes numerous points along the criminal justice continuum. For example, the imposition of a sentence is usually preceded by discussions between Crown and defence counsel and by sentencing representations made to the court. Once pronounced, the sentence is then administered by correctional authorities. The assessment of our sentencing policy would be incomplete if it involved isolating those recommendations which pertained to a particular point along the criminal justice process and evaluating them separately. The recommendations should be evaluated in terms of their anticipated impact upon every aspect of the sentencing process.

2. The Need for Clarity and Predictability

Chapters 3 and 4 documented a very serious problem in the area of sentencing: the sentencing process, for the most part, is not understood by the public nor even by many criminal justice professionals. Since most people obtain information about crime and punishment from the news media, one could easily infer that the media do not adequately explain sentences or, more generally speaking, inform people about the sentencing process.

However, although the news media might be the immediate source of public misinformation, attributing public misunderstanding of sentencing to the media only raises a further question: why is it that the information given by the media is said to be inaccurate? We believe that the answer to this question relates not only to the reporting policies of the various media but also, in part, to the complexity of sentencing provisions and to the absence of clarity and predictability in the sentencing process itself.

Sentencing in Canada is not easy to understand. A few examples will illustrate this point. For instance, a person whose home is broken into may want to know the maximum penalty provided by law for this offence. Section 306 of the *Criminal Code* will tell him or her that breaking and entering a dwelling house carries a maximum penalty of life imprisonment. However, the meaning of this penalty will not be readily apparent from the *Code*. The victim may not realize that the one thing a sentence of life imprisonment does not mean is that the offender will necessarily spend the remainder of his or her natural life in prison. He or she will probably not know that a sentence of life imprisonment may actually mean one of three things. First, if it is a mandatory life sentence provided for first degree murder or high treason, it will mean that the offender must serve 25 years in prison before eligibility for parole. Second, if it is a mandatory sentence for second degree murder, the offender must serve a specific number of years between 10 and 25, as set by the sentencing judge, prior to eligibility for release on parole. Finally, if the sentence is a non-mandatory life sentence, such as that provided for manslaughter, the offender is eligible for parole after serving seven years. Therefore, some knowledge of the parole process and of mandatory life sentences is necessary to be able to comprehend any of the three meanings of life imprisonment. In conclusion, it may be seen that even if the most direct source of information on the criminal law – the *Criminal Code* of Canada – is consulted, the layperson will still be faced with a dilemma. The words will be given their literal meaning, in which case the layperson's interpretation of a life sentence will be wrong, or additional legal knowledge will be needed to be able to understand what the maximum penalty for break and enter actually means.

Let us take this example even further. If the offender who had committed the break and enter were tried and convicted for the offence, the sentencing judge could impose any custodial sentence up to life imprisonment. In view of this maximum penalty, the victim might well expect that the offender would be sentenced to a substantial custodial term. He or she no doubt would be surprised if the judge, after a well-reasoned decision, imposed a large fine and one day of imprisonment. The victim might be bewildered by the discrepancy between the maximum penalty provided for the offence and the sentence actually given. He or she might also question the utility of imposing one day of imprisonment. He or she probably would not realize that, to satisfy the requirements of subsection 646(2) of the *Criminal Code*, the imposition of a fine for an offence punishable by more than five years imprisonment must be accompanied by another punishment, which often is a nominal term of imprisonment. One mechanism for satisfying this statutory provision in a

purely formal way, is to impose one day of imprisonment along with the fine even though the offender will not actually serve the day in prison.

Furthermore, the victim in our example might be surprised to learn that the offender was eventually imprisoned for being unable, rather than unwilling, to pay the fine. On the other hand, if the judge had imposed a sentence of three years in a penitentiary instead of a fine, the victim might be surprised to find the same offender on day parole after six months, or released on full parole after 12 months. The victim might also be surprised to find that if the offender were not released earlier on parole, he or she would be released “automatically” after 24 months on mandatory supervision for which resources for proper “supervision” were not available.

These examples give some indication of the degree to which the sentencing process lacks clarity, certainty and predictability despite its nature as the most serious state intrusion into the lives of citizens. There may be clarity for those who understand the system. Further, those involved in or subjected to the control of the criminal justice system may be able, in particular circumstances, to predict certain outcomes. However, for most people, the system is neither clear nor certain. In view of these considerations, it is not surprising to find that the public misunderstand sentencing. Since misunderstanding a process can lead to dissatisfaction with it, one can appreciate why the general public is critical of sentencing.

As these examples have shown, lack of clarity in the sentencing process arises from at least two sources. First, the substantive complexity of some sentencing provisions (for example, the three meanings of life sentences noted earlier) obscures the layperson’s understanding of the sentencing process. Second, judges have developed various conventions to bring about sentences which otherwise would be precluded by legal formalism. For example, to circumvent the statutory requirement that a fine may not be given for an offence which is punishable by more than five years without also ordering another punishment, sentencing courts often resort to the imposition of a fine plus one day in prison. The purpose of sentences of this nature is not readily apparent to the general public.

One basic aim of the Commission’s sentencing policy is to introduce more clarity into the sentencing process. To the greatest extent possible, this involves bridging the gap between the meaning of a sentence, as written in the law and as pronounced by the court, and its subsequent translation into practice. The Commission has also tried to rid sentencing provisions of those requirements which hinder rather than facilitate the imposition of appropriate dispositions.

3. The Principle of Restraint

We have just referred to the necessity of bridging the gap between the written law and its concrete application; there is also a discrepancy between the

perceived and the actual ability of the sentencing process to provide the ultimate solution to crime control.

The sentencing process is only one part of the criminal justice system and this system is itself only one of several mechanisms by which society tries to maintain order. It is, however, the most coercive of these mechanisms. What is certain about punishment is that it is aversive; what is more contentious is the extent of social benefit actually derived from it. In Chapter 6, we examined the evidence relating to the criminal courts' success in increasing peace and order in society by pursuing such goals as deterrence, incapacitation and rehabilitation of offenders. There is little evidence to support the view that sentencing decisions can have a large impact on reducing the extent of criminal activity in society. This conclusion is based primarily upon an examination of the most severe sanction; namely, custodial sentences.

Humanitarian concerns dictate that punishment should be inflicted with restraint. If one adds to this consideration the fact that the imposition of the harshest form of sanction appears to contribute only modestly to the maintenance of a harmonious society, a commitment to restraint is the inevitable result.

The Commission's endorsement of a policy of restraint is consistent not only with the recommendations of almost every group that has examined the criminal justice system, from the Brown Commission in 1848 to the Nielsen Task Force in 1986, but also with those members of the Canadian public whose views on the matter have been canvassed by the Commission. Although, on first questioning, a substantial portion of the Canadian public indicates that sentences should be more severe, further inquiries clearly show that they are most concerned about offences involving violence and tend to over-estimate the amount of this kind of crime in society. Statistics show that over 90% of criminal offences do not involve violence or the threat of violence (Solicitor General of Canada, 1984). For non-violent offences, which constitute the majority of offences, the public appears to favour limitations on the use of imprisonment. In short, the Canadian Sentencing Commission's support for a policy of restraint is thus consistent both with public opinion and with the recommendations of previous commissions and committees.

In view of the above discussion on restraint and the fact that sentences of imprisonment are imposed substantially less often than community-based sentences, it may seem peculiar that the Commission's recommended sentencing policy appears to focus more on imprisonment than on community sanctions. However, the Commission is of the view that imprisonment is the most intrusive sanction and consumes the greatest amount of resources. It therefore deserves special consideration.

There are also important historical reasons for this focus. Since the middle of the nineteenth century imprisonment has been pivotal to the sentencing process. A striking illustration of this fact is that, even today, community sanctions are referred to as "*non-carceral* sanctions" or as "alternatives to

imprisonment". As argued in Chapter 5, the emphasis on incarceration must be changed and community sanctions must be recognized as sanctions in their own right.

As pointed out in Chapter 1, paragraph (k) of the terms of reference required the Commission to "take into consideration...existing penal and correctional capacities". This part of the mandate stressed the urgency of addressing the issue of restraint and places it within the context of prison overcrowding. It did not, however, prescribe the manner in which the Commission should approach this issue. The preceding discussion shows that the Commission gives priority to humanitarian and justice considerations, although it is not insensitive to limitations on the financial resources of governments. One cannot deny that prison overcrowding is at least partly generated by economic problems, such as the prohibitive cost of building new facilities. More importantly, however, it relates to issues of humanity and justice. The deterioration of conditions in overcrowded prisons might lead some inmates to claim, as they have done in over 40 American jurisdictions, that the punishment has become cruel and unusual because it is disproportionate to the gravity of the offence for which it was imposed.

Prison overcrowding also raises concerns about the administration of justice and clarity in sentencing. There is evidence to suggest that in some jurisdictions where there is prison overcrowding, offenders subject to intermittent sentences or short periods of incarceration are, in fact, exempted from serving their sentence because of lack of space. This practice has disruptive effects upon the administration of sentences.

In an attempt to make the Commission's proposals on the use of imprisonment conform to an interpretation of the principle of restraint, a distinction was made between serious and less serious offences. For very serious instances of some offences the Commission's recommendations imply that the overall amount of time spent in prison may be increased in appropriate cases. For other offences, the actual amount of prison time served or the number of offenders currently imprisoned for these offences should be decreased.

Finally, the implications of the finding that the sentencing process is a limited tool for crime control should be discouraging only to those who look to the courts for comprehensive solutions to social disorder. The Canadian public does not appear to be among those who look primarily to the courts. When asked, in a Commission poll, to state where they thought the primary responsibility for crime control lay, over half responded "with society generally". Only 15% saw the courts as carrying the primary responsibility for reducing crime (see Appendix C).

4. Fairness and Equity

The practice of restraint involves making choices: selecting those offenders who will be incarcerated and those who will not. It also means deciding the

length of custodial sentences. The exercise of restraint thus entails the exercise of judicial discretion and raises the issues of fairness and equity as well as variations in sentencing dispositions.

Chapter 3 concluded that the disparity which currently exists is due largely to structural problems: judges must work within a framework which allows for considerable discretion but which fails to provide systematic information on how that discretion is exercised by other judges. The structure thus fails to provide meaningful guidance about the factors which do and should affect judicial decision-making.

The Commission is more concerned with an assessment of the institutional framework in which judicial discretion is exercised than with an appraisal of the performance of the professionals involved in criminal justice. The Commission believes that sentencing judges in Canada are working as well as can be expected within the present structure. It is the structure itself which is in need of change.

Before discussing the principles which guided the Commission's approach to sentencing guidelines, it is necessary to review one major concern: the formulation of a policy appropriate to the Canadian context.

4.1 The Uniqueness of the Canadian Context

Many common law jurisdictions are currently reviewing or have already studied ways of reforming the sentencing process. Both the approaches to studying the problems and the solutions which have been recommended and/or implemented vary from one jurisdiction to another. However, the criminal justice system in each jurisdiction studied by this Commission is different from the Canadian system in some fundamental aspects. Many jurisdictions, particularly the United States where indeterminate sentencing systems prevail, have a history of minimal judicial involvement in the sentencing process. Further, in many of these jurisdictions there is no tradition of sentence appeals. In other countries which have sentence appeals, such as Great Britain, this procedure is only available to the defendant. Consistency in sentencing is no doubt facilitated in Great Britain by the fact that there is only one Court of Appeal whereas in Canada there are ten provincial Courts of Appeal.

Compared to other countries, the breadth of Canada's geographic and cultural variation and the scope of its criminal law jurisdiction is unparalleled. Unlike Australia or the United States, Canada has one federal *Criminal Code* which applies to all provinces and territories. Although our study of the sentencing systems in other jurisdictions was very informative, the Commission realized from the beginning that the difficulties with sentencing in the Canadian context could not be solved by the importation of foreign solutions. Similarly, although data from other countries were useful in highlighting issues for consideration, the Commission relied on Canadian sentencing data. Our recommended sentencing policy is based on the belief in the uniqueness of the

Canadian criminal justice system and the need to find solutions which address problems of sentencing in this country.

4.2 Working Assumptions

The Commission adopted the position that it was important to consider the strengths of those institutions which are part of the present sentencing system in Canada or which exert a major influence upon it. Although there are some serious shortcomings in the inter-relationships between these components, there appeared to be little value in recommending a lesser role for those parts of the system which function well. There was value, however, in recommending changes which could strengthen their impact.

With regard to the current sentencing process at the trial court level, the following three assumptions were made in consideration of the issue of guidance. First, the sentencing process should reflect basic principles of justice rather than the personal attitudes or views of those who are involved in sentencing decisions. Second, it should also define a common approach to the determination of sentences for sentencing judges since they bear primary responsibility for making the process fair and equitable. A *common* approach should result in introducing more consistency in sentencing and in treating like cases alike. However, a common *approach* does not necessitate a rigid, formal procedure but should be flexible enough to allow different cases to be treated differently. The third assumption made by the Commission was that there is a clear-cut distinction between the concept of guidance and the idea of coercion. Guidance which is effectively mandatory betrays the very notion of guidance.

It is on the basis of these premises that the Commission has proposed sentencing guidelines which are neither purely advisory nor mandatory. As the Commission's sentencing policy respecting guidelines raises a number of additional issues, it is not summarized in this introduction. Suffice it to say here that the Commission has attempted to build upon a recommendation by the Ouimet Committee that all custodial sentences should be justified by the judge either by stating reasons which shall be entered in the record of the proceedings or, where the proceedings are not recorded, by giving written reasons. It should be clarified that the Commission is not actually recommending that all sentences of incarceration should be justified by reasons; this requirement only applies where the sentencing judge has decided that it is appropriate to depart from guidelines issued either by this Commission or by a succeeding sentencing commission. It is proposed that the latter be created to make those refinements on our proposed sentencing policy which, for reasons to be discussed later, could not be accomplished by this Commission.

Appellate review of sentencing decisions should be facilitated by the requirement that reasons must be given to justify departures from the sentencing guidelines. Chapter 3 acknowledged the important role of the Courts of Appeal in supervising sentencing decisions. Concern about the Courts of Appeal relates to the sentencing structure in which they operate. The

current structure of the sentencing appellate process, which is primarily concerned with fitness of sentence, results in two limitations respecting the ability of appellate courts to give guidance. First, without a specific appeal, Courts of Appeal cannot initiate policy-making respecting particular sentencing issues. The second limitation is that the scope of appellate inquiry into sentencing policy is circumscribed by the facts and considerations of a particular case.

Inherent in the Commission's recommendations is a recognition, however, that the appellate structure is well-suited to review not only the fitness of individual sentences but also the merits of policies concerning specific issues (e.g. a range of custodial sentences for a particular offence).

Initiating and formulating general policy is the proper responsibility of Parliament. Submissions received by the Commission suggested that Parliament has played too minor a role in the formulation of sentencing policy for Canada. The Commission agrees that Parliament should play a greater role in developing sentencing policies which will assist the courts in the determination of sentences generally, and custodial sentences in particular.

Accordingly, the Commission proposes that Parliament's involvement in the development of sentencing policy should be increased in the following ways: first, Parliament should through the enactment of legislation establish the purpose and principles of sentencing. Second, the House of Commons upon the recommendations of a broadly representative and permanent Commission, independent of government, should issue directives regarding the general distribution of sanctions. This enhanced participation by Parliament in policy formulation would be balanced by an equally important role for the Courts of Appeal in reviewing the application of directives approved by the House of Commons and in making those adjustments necessary to reflect the particular needs and circumstances of their respective communities. Thus, the Courts of Appeal would also have an amplified role: not only would they continue to interpret the law and review individual sentences, but they would also be empowered in specified circumstances to modify national guidelines for application in their respective jurisdiction.

5. Highlights of the Recommendations

As indicated earlier, the recommendations which follow are designed to provide the sentencing judge with additional structure and guidance for the determination of sentences. They are not intended to restrict the judge's power to impose fair and equitable sentences which are responsive to the unique circumstances of individual cases before the court. Indeed, although we strongly believe that the overall impact of these recommendations would be to make sentences in Canada more fair, predictable, understandable and acceptable to both the offender and the public, the net effect on actual sentences would be less dramatic than might otherwise be anticipated from an

examination of the individual elements of our sentencing policy. This point is most clearly illustrated by a consideration of the following list of the Commission's central recommendations:

- a) **Elimination of all mandatory minimum penalties (other than for murder and high treason).**
- b) **Replacement of the current penalty structure for all offences other than murder and high treason with a structure of maximum penalties of 12 years, 9 years, 6 years, 3 years, 1 year, 6 months.**
- c) **Elimination of full parole release for all sentences other than mandatory life sentences.**
- d) **Provision for a reduction in time served for those inmates who display good behaviour while in prison.**
- e) **Elimination of "automatic" imprisonment for fine default to reduce the likelihood that a person who cannot pay a fine will go to jail.**
- f) **Establishment of presumptive guidelines that indicate whether a person convicted of a particular offence should normally be given a custodial or a community sanction. In appropriate cases the judge could depart from these guidelines.**
- g) **Establishment of a "presumptive range" for each offence normally requiring incarceration. Again the judge could depart from the guidelines in appropriate cases.**
- h) **Creation of a permanent sentencing commission to develop presumptive ranges for all offences, to collect and distribute information about current sentencing practice, and to review and, in appropriate cases, to recommend to Parliament the modification of the presumptive sentences in light of current practice or appellate decisions.**

As pointed out earlier, this is a bare outline of some of the Commission's recommendations. Nevertheless, it does highlight the importance of viewing each proposal as part of an integrated sentencing policy. For example, a person who learns that the Canadian Sentencing Commission has recommended the reduction of the statutory maximum penalty for robbery from life imprisonment to nine years might think that the Commission was recommending a wholesale reduction in the actual sentences for robbery. This would be ignoring both the discrepancy between current practice and current statutory maxima as well as various other parts of the package (e.g., the elimination of parole and reduction of remission). These recommendations, taken as a whole, do not have the effect of reducing time actually served by persons sent to prison for serious robberies.

Upon learning that the Commission has recommended the abolition of parole one might think that as a result offenders will be imprisoned for longer periods of time. This assumption, however, does not take into account the

recommendations concerning the reduction of maximum penalties, presumptive ranges for particular offences as well as the recommendations governing sentencing for multiple offences.

The rare person in Canada with access to information about current sentencing practices who made a comparison between the proposed presumptive range of imprisonment for an offence, such as break and enter into a dwelling house, and current sentencing practice, would think that the recommended sentences were considerably shorter than sentences given at present. This person would not be taking into account the recommendation relating to parole and the recommendation that prisoners serve 75% of their sentence before being eligible for release from prison on the basis of remission earned for good behaviour. These provisions (and others) have the effect of changing the meaning of a sentence. In terms of clarity, an important impact of these recommendations would be that the sentence described in court will bear a closer resemblance to the actual sentence served by the offender.

The sentencing proposals recommended by the Commission are not a simple set of changes. In the end, however, they should result in a more understandable and fair system than the current provisions which are not only complex but contain both real and apparent contradictions.

Chapter 8

Mandatory Minimum Penalties

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Chapter 8

Mandatory Minimum Penalties

Mandatory minimum sentences have been criticized on the basis of their rationale, their effectiveness, and their appropriateness, even though there are very few such provisions in the *Criminal Code*. The issue of their continued or increased use is hotly debated (Canada, Sentencing, 1984; 60).

The fundamental elements of the structure of punishment in Canada (i.e. maximum and minimum penalties) have remained in place for close to a century. Piecemeal amendments have been made to the *Criminal Code* over the years within the confines of this framework and so, as recently as 1985 Parliament increased minimum penalties for a first conviction of drinking and driving offences. In formulating these amendments, Parliament was not formulating a global sentencing policy but performing a necessary role in addressing particular problems. In contrast, the mandate of the Canadian Sentencing Commission requires an examination of all aspects of sentencing, including the use of minimum penalties. Although after considering this issue, the Commission concluded that minimum penalties should be abolished, this does not indicate a disagreement with recent legislation enacted by Parliament. The Commission's recommendations respecting minimum penalties do not dispute the policy objectives embodied in recent criminal law amendments but rather question the use of minimum penalties as the desired means for achieving those goals.

Of over 300 offences in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act*, there are only *ten* offences which carry a mandatory minimum penalty of a fine or term of imprisonment. Even though they are few in number, minimum penalties have provoked concern and debate. Some say they offend our notions of justice because the imposition of the mandatory penalty results, in some cases, in "cruel and unusual punishment"¹. Others maintain that mandatory minima are an effective means for Parliament to send a message to the public that certain crimes will carry a mandatory penalty regardless of the circumstances of the offence or the offender.

The questions addressed by this Commission were whether mandatory minimum fines and terms of imprisonment constitute just and effective sanctions and whether there is a real need for their continued existence.

1. Terms of Reference

According to paragraph (d)(ii) of the terms of reference, the Commission is directed,

...to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including: ...mandatory minimum sentences provided for in legislation....

The issue of mandatory minimum penalties is to be considered within the context of guidelines. Hence, the terms of reference pose two major questions with respect to mandatory minima. First, do they serve a valid purpose in the current sentencing scheme? Second, would they serve a valid purpose within the context of the Commission's proposed sentencing policy?

2. Legislative History

In 1892, when Canada adopted the *Criminal Code* drafted by Stephen, it inherited a legislative framework in which the relative seriousness of offences was to be inferred from the maximum penalty attached to each offence. Then, as today, very few offences carried a minimum penalty.

With only maximum penalties to set the upper limit, the legislative framework provided the judiciary with broad discretion as to the nature or severity of the sanction to impose. Mandatory minimum penalties were the exception to this rule. For a select group of offences, Parliament continued to curtail the discretion of judges by making a term of imprisonment mandatory and by specifying the minimum length of that term.

Theft from the mails was one of the offences that carried a three year mandatory minimum in the original *Code* adopted in 1892 (S.C. 1892, c. 29, ss. 326-27). This minimum survived a number of amendments until it was repealed in 1968-69. In fact, the minimum had been removed earlier in 1944 due to the difficulty of obtaining a conviction for offences carrying a mandatory prison term (Canada, House of Commons Debates, June 15, 1944(a)). Judges and juries were less likely to convict knowing that a three year minimum period of incarceration would follow automatically upon conviction regardless of the circumstances of the offence or the offender (Canada, House of Commons Debates, June 28, 1944(b)). However, in 1948, the minimum was restored; Parliament felt that the sentences imposed by judges were inadequate (Canada, House of Commons Debates, June 14, 1948).

In 1919, Parliament set a one year minimum penalty for theft of a motor car (S.C. 1919, c.46, s.9). In order to avoid imposing the minimum jail term, judges began employing suspended sentences. Parliament responded two years later with an amendment stating that no suspended sentences were to be imposed for this offence without the consent of the Attorney General (S.C. 1921, c.25, s.5). As a result of the recommendations of the Royal Commission

on the Revision of the Criminal Code (1952), this minimum penalty was abolished in 1954 (S.C. 1953-54, c.51, s.281).

Even though they have changed significantly over the years, some mandatory minimum penalties – such as those for murder and high treason – have been in existence for a long period of time. Others, such as the minimum penalty for drinking and driving were recently amended, although they have existed for more than half a century. However, over the past 50 years mandatory minimum penalties have been created for only four other offences: use of a firearm during the commission of an offence (s. 83); gaming and betting (s. 186, s. 187); and importing narcotics (*Narcotic Control Act*, s. 5(2)). As is evident from debates in the House of Commons and Senate, Parliament’s objectives underlying the imposition of these mandatory minima were primarily to highlight the seriousness of the offence and achieve greater deterrence.

3. Current Mandatory Minima: Fines and Terms of Imprisonment

As stated in Chapter 1, only the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV) were examined by this Commission. All offences currently carrying a mandatory minimum penalty are presented in Table 8.1. With the exception of high treason, murder and importing/exporting narcotics, the minimum penalty for each offence depends on whether it is a first, second, or subsequent conviction.

Table 8.1
Current Mandatory, Minimum Penalties

| | | | Conviction | Minimum | Maximum |
|--------------------------------|---------------|---|---------------------------------|-----------------------------|----------|
| a) Mandatory Life Sentences | | | | | |
| (Criminal Code only) | | | | | |
| s. | 47(1) | High Treason | All | Life | Life |
| s. | 212/213 | First Degree Murder | All | Life | Life |
| s. | 212/213 | Second Degree Murder | All | Life | Life |
| b) Mandatory Minimum Sentences | | | | | |
| i) Criminal Code | | | | | |
| s. | 83 | Use of firearm during commission of offence | first second | 1 year 3 years | 14 years |
| s. | 237(a)/239(1) | Impaired driving | first second (subsequent) | \$300 14 days 90 days | 5 years* |
| s. | 237(b)/239(1) | Exceeding .08 | first second (subsequent) | \$300 14 days 90 days | 5 years* |

| | | | Conviction | Minimum | Maximum |
|------|---|--|---------------------------------|----------------------------|----------|
| s. | 238/239(1) | Refusal to provide sample (impaired driving) | first second (subsequent) | \$300 14 days 90days | 5 years* |
| s. | 186 | Betting, pool-selling, book-making | second (subsequent) | 14 days 3 months | 2 years |
| s. | 187 | Placing bets on behalf of others | second (subsequent) | 14 days 3months | 2 years |
| ii) | <i>Narcotic Control Act</i> | | | | |
| s. | 5(2) | Import/export narcotics | All | 7 years | Life |
| iii) | <i>Food and Drugs Act</i> (Parts III, IV) (No mandatory minima) | | | | |

* Hybrid offence: more serious charges are proceeded with by way of indictment (5 year maximum); less serious charges by summary conviction (6 month maximum).

In Table 8.1, the Commission has identified two basic types of minimum penalties. The seven offences under the heading “mandatory minimum sentences” carry what we consider to be standard *minimum* penalties. These minima are indicated in criminal legislation by use of the words “not less than...”, which refer to the quantum of punishment. Sub-section 5(2) of the *Narcotic Control Act* is one example of legislation which carries a standard minimum penalty of “not less than seven years”.

The remaining three offences, first degree murder, second degree murder and high treason are listed in the Table as “mandatory life sentences”. The only possible sentence for these offences is life imprisonment since the minimum and maximum penalty is the same. Hence it is the *mandatory* nature of these single penalty offences that sets them apart from the other standard mandatory *minimum* sentences. In this chapter, the Commission will focus exclusively on the seven standard *minimum* penalties prescribed in the *Criminal Code* and *Narcotic Control Act*.

There is one final note with respect to *mandatory* sentences. Although the sentence of life imprisonment is mandatory for all three offences, there is a difference in the minimum term of imprisonment to be served in custody before eligibility for parole. Since this issue relates primarily to early release, minimum parole ineligibility periods will be discussed in Chapter 10 (*The Meaning of a Sentence of Imprisonment*).

4. Problems

4.1 Past Commissions

In the past 35 years, all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished.

The Royal Commission on the Revision of the Criminal Code (1952), established to advise the government on required amendments to the *Criminal*

Code, concluded that all minimum punishments should be abolished. The report quotes an introduction to the original Draft Code in which the Attorney General of England referred to minimum penalties as “a great evil” that would, to a considerable extent, be set aside by the new legislation (p. 234). The report further refers to an article by Chief Justice McRuer in which he claims that, except in the case of murder, a minimum sentence “tends to corrupt the administration of justice by creating a will to circumvent it” (p. 234). This argument was to recur frequently in later debates on minimum penalties.

In spite of the recommendations that no minima should survive the 1953-54 Code revision, a few were retained on the grounds that, “...while there may be some merit in the recommendation of the Commission, we think that because of their deterrent effect minimum penalties should not be entirely abolished”. (Senate of Canada, 1952; 210).

In 1969, the Ouimet Committee recommended that “existing statutory provisions which require the imposition of minimum mandatory sentences of imprisonment upon conviction for certain offences other than murder be repealed” on the grounds that these constituted an unwarranted restriction on the sentencing discretion of the court (p. 210).

Finally, the Law Reform Commission of Canada (1975b; 24) called for the abolition of mandatory minima and summarized some of the major problems that these penalties generate:

While there are no available objective measurements on the effectiveness of such sanctions, experience does not show that they have any obvious special deterrent or educative effect. Generally, the reported research does not show that harsh sanctions are more effective than less severe sanctions in preventing crime. Other problems arise in denying judges discretion to select the appropriate sanction or the length of a prison term in individual cases. For one thing circumstances vary so greatly from case to case that an arbitrary minimum may be seen as excessive denunciation or an excessively long period of separation in the light of the risk and all the circumstances. Indeed, not every case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and a non-custodial sentence.

4.2 Submissions

The vast majority of the submissions received by the Commission argued for the abolition of mandatory minimum penalties². As well as the major problems outlined by the Law Reform Commission of Canada, a number of other arguments against mandatory minima were advanced. Some felt that minima represent an over-reaction to excessive discretion and individualization of sentences and, in forbidding consideration of the circumstances of each offence, mandatory minima can lead to sentences which are unduly harsh.

It was also argued that as well as encouraging distortion in fact-finding (juries avoiding a finding of guilt) and an inconsistency in charging practices, mandatory minima encourage technical defences. An accused person facing a mandatory term of incarceration has nothing to gain by pleading guilty and may take full advantage of procedural tactics and appeal mechanisms that he or she may otherwise have eschewed.

Concern was also expressed regarding the disparity that results from the imposition of mandatory minima, particularly the disparate sentences that result from plea negotiations. What must the public think when they read of a seven year term for importing “soft drugs” when a much briefer term is imposed for bringing into the country large quantities of narcotics? What the public seldom knows is that in the latter case, the accused pleaded guilty to a possession or trafficking charge as a result of a plea negotiation in order to avoid the obligatory seven year penalty for importing. The reason for such perceived unfairness remains invisible and consequently justice is neither done nor seen to be done.

4.3 Surveys

Sentencing judges were divided upon the issue of mandatory minimum penalties (Research #6). When asked if minimum penalties restricted their ability to give a just sentence, slightly over half (57%) responded affirmatively. Only 9% stated that mandatory minima never restricted their ability to impose a just sentence. In addition, slightly over half believed that the current mandatory minima contribute to inappropriate agreements between Crown and defense counsel. Only 5% felt that the presence of a mandatory minimum penalty never resulted in inappropriate agreements.

On the other hand, judges expressed some faith in the deterrent effect of these penalties. Almost three-quarters of the sample endorsed the view that these sentences convey a message to the public about the seriousness of certain offences.

Although on many other issues Crown and defense counsel held divergent views, they agreed that plea bargaining was more likely to occur in cases involving an offence carrying a mandatory minimum penalty (Research #5). However, disagreement emerged when this question was pushed further. Over 75% of defense counsel felt that mandatory minimum penalties caused Crown and defense to enter into agreements they would otherwise avoid, while only 38% of Crown counsel agreed. Responses to both questions varied significantly from province to province. For example, in British Columbia, 88% of defense counsel felt that Crown and defense entered into agreements they otherwise would avoid, whereas in New Brunswick only 33% of defense counsel felt that occasionally mandatory minima resulted in such agreements. These results suggest that the perception of the impact of mandatory minima on plea bargaining varies significantly across the country. However, it is not the variation itself that is most telling, but rather the fact that whatever the

province and regardless of whether a lawyer acts for the defense or the Crown, there is *always* a significant percentage of respondents who endorsed the view that mandatory minima lead to agreements that they would otherwise avoid.

Other professionals involved in the criminal justice system (i.e. probation and parole officers) expressed negative views of the mandatory seven year minimum for importing narcotics (*Rizkalla, 1986*). In their view, this penalty was ineffective in accomplishing its aim (deterrence), unjust in its application, and conferred too much power upon police and Crown counsel.

A survey of the opinions of prison inmates in Quebec on various issues pertaining to the Commission's mandate revealed that inmates in both prisons (three groups were surveyed) and penitentiaries³ (13 groups were surveyed) had misconceptions about the nature of minimum penalties (*Landreville, 1985*). They usually confused minimum penalties with mandatory parole ineligibility periods. The most frequently-cited example of the latter was the mandatory parole ineligibility period of 25 years for offenders convicted of first degree murder. The notions of mandatory minimum penalties and mandatory minimum parole ineligibility periods are, in fact, quite distinct: an offender convicted of importing drugs will receive at least a seven year sentence, which is the minimum penalty provided by law for that offence; this offender will nevertheless be eligible for full parole after serving one-third of his sentence (28 months). The fact that only two of the 16 inmate groups surveyed were able to give examples of offences carrying minimum penalties (importing drugs and use of a firearm in the commission of an indictable offence) illustrates a lack of familiarity with minimum penalties.

Research addressing public knowledge of statutory penalties was discussed in Chapter 4. However, it may be useful to summarize here some of that research dealing with minimum penalties. Members of the public were asked several questions and the results showed the majority had little idea of the existence of minimum penalties. When asked to name an offence carrying a minimum penalty, very few correctly identified any. They were provided with a list of five offences and asked to identify the one carrying a minimum. Only 28% correctly identified impaired driving. In fact, a comparable number thought manslaughter carried a minimum penalty. They were then asked specifically what the minimum was for importing a narcotic. Sixty-two percent chose "don't know". Thus few members of the public are aware which offences carry minimum penalties. Fewer still know the severity of those minima.

5. Commission Proposals

5.1 Issues

The recommendations of the Commission are preceded by a discussion of the various issues raised by mandatory minima. These include those issues which have been addressed by the courts since the proclamation of the *Canadian Bill of Rights* in 1960 and the *Canadian Charter of Rights and*

Freedoms in 1982. All remaining issues in the context of the sentencing theory proposed in the previous chapters will then be discussed.

5.1.1 Recent Jurisprudence

Mandatory minima raise two related questions that have been addressed by recent jurisprudence⁴. First, does the imposition of minimum sentences, such as seven years for importing, constitute “cruel and unusual punishment”? Second, does the removal of judicial discretion implicit in a minimum sentence authorize the imposition of “arbitrary imprisonment”?

Not surprisingly, courts have been faced with these issues primarily in the context of the seven year minimum for importing narcotics. It is the most severe standard minimum currently existing.

a) Cruel and Unusual Punishment

The concern that the imposition of a mandatory sentence of imprisonment may constitute “cruel and unusual punishment” is not new. In *R. v. Shand* (1976), 29 C.C.C. (2d) 199 (Ont. Co. Ct.) the trial court judge wrote a lengthy judgment examining the issue of whether s. 5(2) of the *Narcotic Control Act* was “cruel and unusual punishment” within the meaning of s.2(b) of the *Canadian Bill of Rights* (R.S.C. 1970, App. II). The judgment held that the seven year minimum was cruel and unusual punishment in that it could be “unusually excessive” given “...the crime committed, the person who committed it, the nature, quantity and value of the drug involved, the current range of sentences for closely related offences, the sentences provided for closely related offences in the *Food and Drugs Act* and sentences for comparable crimes in other jurisdictions...” (p. 234).

Although the decision of the trial court (to set aside the mandatory minimum sentence of seven years) was overturned by the Court of Appeal, concern with the severity of this penalty remains. Indeed, the Court of Appeal recognized that “in a marijuana case particularly, the seven year minimum may in some circumstances be inequitable”, although “it is not cruel” (*Shand* (1976), 30 C.C.C. (2d) 23 at p. 36). In defence of a seven year term, the following argument was advanced. Parliament endorsed a minimum penalty knowing in some cases the effect on an individual may be unduly harsh, but acknowledging that a greater goal – the containment of the drug trade – was thereby achieved. Since these narcotics cannot easily be grown in Canada, illicit commerce is highly dependent upon importation. It was the aim of Parliament to cut off the source, using the power of the criminal law. The intention, then, was to deter potential traffickers by the magnitude and certainty of the minimum penalty. In fact, general deterrence is the most frequent justification raised for minimum penalties. It was this putative deterrent effect that prevented Parliament from adopting the 1954 recommendations to abolish all minima (Senate of Canada, 1952; 210).

If indeed there existed unequivocal evidence that minimum penalties were an effective deterrent then one might argue that minima should not only be retained, but extended to other offences. Surely society, through the criminal law, is more interested in deterring robbers and rapists than people who place bets on behalf of others.

Earlier chapters noted that the results of research on the existence of a deterrent effect of punishment were too inconclusive to warrant a policy of increasing either the scope or the severity of punishment in order to deter potential offenders. To this general point must be added the following considerations. No punishment can deter if its very existence is unknown. In this regard research upon the views of inmates showed that their perception of the existence of mandatory minimum penalties was confused, thus adding to the difficulty of attributing a particular deterrent effect to mandatory minima. Furthermore, research conducted on mandatory minima in the area of gun control legislation or impaired driving was no more conclusive than the general studies on the deterrent effect of punishment⁵. Of course, one cannot disclaim any deterrent effect of mandatory minima, but when the uncertain benefits of such punishment are weighed against their acknowledged disadvantages, their retention seems unjustified.

The second objection is that mandatory minimum terms of imprisonment, such as the seven year term for importing narcotics, have little impact upon the very individuals whom the original legislation sought to affect. Judges in this country can, and do, give severe sentences to individuals convicted of this offence. Thus in *R. v. Wai Fun Fung* (1979), 3 W.C.B. 397 the Court of Appeal affirmed a 17 year sentence for a first-time courier of heroin. The seven year minimum, although it may impel judges to impose higher sentences in serious cases, provides no additional weapon to the judicial arsenal: it merely ensures that the least serious cases receive a sentence that is both uniform and severe. Consequently, the punitiveness of the mandatory term is directed at the least serious cases. The substantial sentences in excess of the minimum seven years imposed in the more serious cases are more a reflection of the high maximum penalty (e.g., life imprisonment for importing) than of the mandatory minimum.

This point was forcefully made in *R. v. Smith* (1984), 11 C.C.C. (3d) 411, (B.C.C.A.) a case in which it was alleged that the minimum sentence of seven years imprisonment for the importation of drugs violated sections 9 and 12 of the *Charter*. The British Columbia Court of Appeal ruled that it did not. However, in a dissenting opinion, which offers a very comprehensive treatment of the issues involved, Mr. Justice Lambert noted:

The only gain is the general deterrent effect of sentencing minor drug importers to terms of seven years instead of lesser terms, in those cases where a sentencing judge might regard as a fit sentence, a sentence of less than seven years. It is not the serious importers who are affected by s. 5(2). (p. 431)

Sentencing data sustain this view. An examination of all sentences for importing from a recent two year period (1983-84) reveals that fully 2/3 of the

cases received exactly the minimum seven years. It is clear that in practice the original intention of Parliament – to provide a high (seven year) *starting* point for sentences – has not been achieved. For over 67% of cases the starting point is also the ending point.⁶ To know exactly why this is the case would require additional information about the particular circumstances of each case (e.g. the type and amount of narcotic involved). However, data certainly support the view that the minimum sentence affects primarily the least serious cases.

Data provided in *Sentences Drogues*, a sentencing digest on drug offences prepared by the Québec Service de recherche de la Commission des services juridiques (1984), show that when they are dealing with serious cases, judges are quite willing to impose sentences which are much harsher than the minimum. This digest reviews in detail 25 recent sentences imposed for the importation of narcotics. Eighteen of the 25 exceeded seven years, the longer sentences ranging from 12 to 20 years. Seven of the 25 sentences did not exceed the seven year statutory minimum penalty. The primary determinants of sentence length were the nature and the quantity of the narcotics imported: longer sentences were generally imposed for cases involving hard drugs (heroin, cocaine) or large quantities of soft drugs (hashish and marijuana); the minimum penalty was imposed in all cases involving smaller quantities of soft drugs.

The proliferation of drug use and trafficking in recent years bears witness to the fact that the aim of general deterrence has not been realized. Not only has the minimum penalty failed to provide any additional protection against the “big-time” importers that pose such a threat to society, but the legislation has dealt a considerable blow to the concept of individualized justice.

b) Arbitrary Imprisonment

The second ground for objecting to mandatory minima is that they authorize arbitrary imprisonment, in violation of s. 9 of the *Charter* which states, “everyone has the right not to be arbitrarily detained or imprisoned”. This argument applies to all minimum penalties from the least to the most onerous. In many cases, mandatory minimum punishments require a judge to impose a sentence without regard to the circumstances of the offence or the offender. For offenders convicted of an offence carrying a mandatory minimum period of imprisonment, incarceration simply accompanies conviction – the sentencing judge is bound to disregard any other considerations which in the case of other offences might have mitigated against incarceration.

In rejecting the view that the minimum seven year term for importing constitutes arbitrary punishment, the majority in *Smith* (1984), 11 C.C.C. (3d) 411, (B.C.C.A.) at p. 418, held that “a court should not categorize such legislation as ‘arbitrary’ or ‘cruel and unusual’ unless it is clearly satisfied that this conclusion is beyond doubt”. The majority judgment further states that “an important factor, I think, in the determination of the issue is to ask - What is the legislation seeking to achieve?”. The judgment then proceeds to defend the minimum for large-scale importing upon grounds which we have already

outlined – deterring big drug smugglers – and which have been questioned. For the court in *R. v. Newall et al.* (No. 4) (1982), 70 C.C.C. (2d) 10, the fact that the legislation was enacted by Parliament meant it was not arbitrary.

However, in the dissenting judgment in *Smith*, Mr. Justice Lambert argues that in evaluating whether the seven year minimum constitutes cruel and unusual punishment the court should look not only to what Parliament *intended* to achieve, but also to the *effect* of the legislation:

In short, the effect of s. 5(2) is that guilt or innocence on a charge of importing or exporting a narcotic is determined judicially by a judge or jury, but the sentence is not determined by a judge or a jury, but is predetermined by Parliament. That predetermination by Parliament pays no attention to the individual offender or the circumstances of his offence. In that respect the determination is arbitrary, and the resulting imprisonment is arbitrary imprisonment.

I emphasize that I am considering only the arbitrary *effect* of s. 5(2) on an offender. The *effect* is that it imposes imprisonment arbitrarily. And it is that *effect* that is contrary to s. 9 of the Charter. (p. 425)

Whether it is the role of the court to consider the “effect” of certain legislation is not for us to decide. It is, however, clearly the role of this Commission to consider and weigh what Parliament intended in enacting this legislation *and* its actual effects. In order to fulfill its mandate, this Commission must address the issue of whether the unintended negative effects of mandatory minima nullify the benefits that were expected to ensue from their enactment.

It also seems clear that in the case of the seven year minimum for importing, it is those convicted of the *least serious* instances of the offence who are denied the right to sentencing consideration unconstrained by a minimum. An individualized sentence is still possible for the more serious cases of importation. And, as is apparent from the diversity of sentences above the seven year minimum, current practice suggests that individualized justice still operates there. However, concern is raised by less serious cases such as the frequently-quoted example of the offender who would receive seven years for bringing a cigarette of marijuana into the country. If such a person were to succeed in passing it to another person, the latter might receive a suspended sentence for possession. Such disparate sentences would clearly violate the principle of proportionality and should be avoided.

Those who argue in favour of mandatory minima will suggest such a turn of events is never likely to come to pass owing to the sage exercise of prosecutorial discretion. As was pointed out in Mr. Justice Lambert’s dissent in *Smith* (1983), 35 C.R. (3d) 256, this seems a poor solution to the problem:

I reject the argument that the ameliorating effect of prosecutorial discretion prevents the mandatory prison sentence of seven years required by s. 5(2) of the *Narcotic Control Act* from giving rise to arbitrary imprisonment. The lesson of history is that mandatory minimum sentences put an improper burden on prosecutors, and give rise to perverse verdicts of acquittal. (p. 427).

This view was also shared by the trial court which held that imposing mandatory minimum penalties based on the mere possibility of the “worst case” scenario meant that legislation permitting such possibilities was *ultra vires*.

While the majority decisions in recent cases have held that the minimum sentence of seven years imprisonment is neither “arbitrary” nor “cruel and unusual”, it is clear that the matter is far from closed. In fact, at the time of writing, the matter is under consideration by the Supreme Court of Canada which, after hearing the appeal of *R. v. Smith*, has reserved judgment.

c) Conclusion

This Commission is committed to the principles of proportionality and equity. These principles operate at two levels. First, when Parliament prescribes or amends a maximum penalty, it should ensure that the penalty is commensurate with the seriousness of the offence as defined in the *Code*. Since the legal definition of criminal offences is generally broad, the maximum penalty is no more than a general indication of the sentencing range within which the judge may exercise a great deal of discretion. Second, however, the principles of proportionality and equity should further guide the judge in determining a just disposition in the particular case before the court. At this level, each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined. Although the offence should be the focus in determining the appropriate penalty, the circumstances of the offender must also have some weight.

Furthermore, it is not merely uniformity of approach that sentencing must concern itself with, but also uniformity of impact. Clearly, a \$300 fine is a far greater penalty for a person with no income than for a wealthy executive. Absolute uniformity of impact may never be perfectly attained – the punishment may never be truly commensurate with the seriousness of the offence and blameworthiness of the offender. There are too many variables for that to happen, but it is a goal to which this Commission is committed and which mandatory minima militate against.

It is unclear whether mandatory minimum penalties violate section 9 or section 12 of the *Charter of Rights*. This Commission is not a tribunal and therefore should not issue judgments. Its mandate is to make recommendations on sentencing policy. In this context of sentencing policy, the ongoing debate in the jurisprudence on minimum penalties can be viewed as a strong indication that there are persistent problems surrounding the use of such sanctions. The existence of mandatory minima appears to be justified by a belief in their deterrent value which is dubious at best. It is at least clear that mandatory minima are opposed to the principle of proportionality.

5.1.2 Legislative Guidance

The maximum penalty attached to each offence is, for all but the few offences carrying a mandatory minimum, the only existing legislative guidance as to the relative seriousness of criminal offences. An argument sometimes raised as a justification for mandatory minima is that they reflect with greater precision the seriousness with which Parliament views a particular offence. This argument over-simplifies the real significance of mandatory minima, but it has been used so often as a justification for their existence that it is necessary to refute it.

Certainly with respect to the mandatory life sentences for murder and high treason one can take no issue with this argument. The other offences carrying minima, however, are clearly not the most serious offences, but rather a cross-section of those offences that have caused some public and political controversy. For example, the gaming and betting offences carry a maximum of two years, and a mandatory minimum of 14 days in jail for a second offence. If an impaired driving case is proceeded with by way of summary conviction, it carries a *maximum term* of 6 months imprisonment and a mandatory minimum fine of \$300. If maximum penalties provide a general guide to the seriousness with which Parliament views the offence, then the existing mandatory minima were prescribed not for the most serious offences, but for offences ranging from most to least serious. It is the past practice of piecemeal creation of mandatory minima for offences of varying degrees of seriousness that has generated confusion and obscured their intended purpose. Where an offence carries both a low maximum and a mandatory minimum penalty, the law reflects with ambiguity if not inconsistency the seriousness of the offence. The low maximum implies low seriousness whereas the mandatory minimum is a reflection of greater seriousness.

5.1.3 Accountability

The need for explicit mechanisms to ensure accountability in the use of discretion has been recognized by the Government of Canada in its publication, *The Criminal Law in Canadian Society*:

The criminal justice system must be accountable for its decisions and the effects of those decisions, as is any public agency. Indeed, it must be more accountable than most, because of the direct or potential impact of the criminal justice system on the rights and liberties of individuals. Accountability in all its dimensions – legal, financial, public and political – must therefore be a question specifically addressed in the criminal law. (Canada, 1982; 33)

For offences carrying a mandatory minimum, the exercise of discretion becomes less visible as the discretion shifts from the judge to Crown counsel and police. Accountability is then jeopardized. In other words, the focus of the discretion is no longer on the judge in deciding in open court which sanction to impose, but shifts to the police in deciding which charge to lay (e.g., importing, carrying a seven year minimum or trafficking with no minimum). The Crown's

discretion as to which charge to proceed with is exercised not in open court, but unilaterally or through plea negotiations, the nature of which are seldom known to the judge and almost never known to the public. The exercise of this discretion is not subject to public scrutiny or judicial review. The Crown's bargaining position is enhanced by the certainty of the penalty the offender faces upon conviction and a guilty plea to a lesser included offence may be the only option open to an accused. Accountability in the use of discretion dictates that, wherever possible, discretion should be exercised in an open forum.

5.1.4 Restraint

Finally, and perhaps most importantly, mandatory minimum terms of imprisonment contradict the principle of restraint. Restraint calls for imprisonment as a last resort, and although in a second impaired driving case a term of imprisonment may indeed be justified, the same will likely not be true for a second conviction for betting. This is not to argue that those persons convicted of offences carrying a mandatory minimum penalty should never receive a term of incarceration, but rather that in order to be true to the principle of restraint, judges must have discretion to consider community sanctions before imposing sentences of incarceration.

Mandatory fines also have the effect of undermining restraint. Although in theory a fine is a community sanction, in current practice it results in imprisonment for many offenders who default in their payment. If the mandatory fine is imposed on an indigent offender who otherwise would have received an alternate community sanction, including the possibility of a discharge, then it no longer represents the least onerous acceptable sanction.

5.2 Recommendations

The answer to the initial question posed – whether mandatory minima serve a valid purpose in the current sentencing scheme – has been answered with notable unanimity given the variety of sources. Calls for the abolition of mandatory minima within the current framework of the criminal justice system have been made by commissions, academics, and criminal justice professionals alike.

This Commission is of the view that existing mandatory minimum penalties, with the exception of those prescribed for murder and high treason, serve no purpose that can compensate for the disadvantages resulting from their continued existence.

In the context of the Commission's sentencing package, the rationale for mandatory minima is even less justifiable. Mandatory minima cannot serve as an indication of Parliament's view of the relative seriousness of offences given that they now apply to some offences carrying the lowest maximum penalty. If Parliament is to convey in a systematic manner its view of the relative

seriousness of offences, it must do so through the maximum penalty for each offence and not just through the minimum penalty currently attached to a limited number of offences. Minima have historically been applied to “topical” crimes (once it was theft of mail; today it is illegal use of firearms) rather than to crimes judged to be most serious relative to all other offences set out in the *Criminal Code*. The recommendations of The Canadian Sentencing Commission address the issue of relative seriousness in Chapter 9 which deals with the revision of maximum penalties.

The answer to the second question posed – whether mandatory minima serve a valid purpose in the proposed sentencing scheme – is also no. This answer reflects not only the concerns raised earlier, but anticipates recommendations with respect to maximum penalties, plea bargaining and guidelines. The sentencing package advocated by this Commission strives to obtain greater certainty and simplicity. In this respect at least, it could be said that minimum penalties are consistent with these aims: they are both certain and simple. The difficulty arises when one considers the cost at which this is achieved. In the view of this Commission, these aims can be realized far more efficiently by the proposals regarding sentencing guidance which are described in later chapters.

The recommendation regarding sentencing guidelines explicitly rejects any form of mandatory guidance. *Mandatory* guidelines compel the judge to impose a pre-determined penalty for each offence. These constitute the least desirable form of guidance to the courts. Mandatory minimum penalties, although currently used for only a few offences, have no place in a sentencing framework designed to provide guidance in the determination of individual sentences. One of the objectives of these proposals is to strive for a uniform approach and greater consistency in sentencing but not absolute uniformity.

As will be stressed in the following chapters, each of the Commission’s recommendations must be considered within the context of the entire sentencing scheme proposed in this report. Any decision or recommendation made with respect to one aspect of the criminal justice system in fact affects many other aspects of the process. Decisions regarding mandatory minima are closely linked to other elements of our mandate, including maximum penalties, guidelines and plea negotiations.

8.1 The Commission recommends the abolition of mandatory minimum penalties (fines and periods of incarceration), for all offences except murder and high treason.

Parliament has recently enacted amendments to the drinking and driving provisions in the *Criminal Code* increasing the amount of the minimum fine for these offences. Within the current sentencing structure, the enactment of mandatory minimum penalties is one of the only means available to Parliament to show its growing concern about certain crimes. Hence, this Commission does not feel that the recommendation to abolish mandatory minimum penalties runs contrary to current wisdom.

The Commission is of the view that within the framework of the proposed sentencing policy there will be no necessity for the continued use of mandatory fines and terms of imprisonment. Recommendations regarding maximum penalties, guidelines, and plea bargaining will set the basic structure for that framework. It is felt that a system of guidelines can accomplish the objectives that Parliament sought to achieve through the enactment of mandatory minima, but without unduly constraining the courts.

In the preceding discussion of mandatory minimum penalties, mandatory fines and terms of imprisonment were addressed. The issue of mandatory orders, such as the recently-enacted order prohibiting driving for a certain period after a conviction for impaired driving, was not discussed, not because they are of little importance, but rather because it was felt that further study of orders should be undertaken.

Although the nature of an order of prohibition is quite different from a penalty, its impact can be severe. A mandatory order that prevents an offender from driving may be a minor inconvenience for one person but may result in the loss of livelihood for another. It is primarily on the basis of proportionality that it seems appropriate to recommend that mandatory orders be reviewed. The necessity for review will become particularly important if mandatory minimum fines and terms of imprisonment are abolished, since mandatory orders will then represent the most frequently imposed mandatory disposition.

8.2 The Commission recommends that mandatory prohibition orders be further studied in light of the proposed sentencing framework.

6. List of Recommendations

8.1 The Commission recommends the abolition of mandatory minimum penalties (fines and periods of incarceration), for all offences except murder and high treason.

8.2 The Commission recommends that mandatory prohibition orders be further studied in light of the proposed sentencing framework.

Endnotes

- ¹ See *R. v. Shand* (1976), 29 C.C.C. (2d) 199 at p. 234 as per Borins, J. (Ont. Co. Ct.).
- ² Of the few individuals and organizations who argued for the retention of mandatory minima, most expressed the belief that the deterrent value of mandatory minima outweighed their disadvantages.
- ³ Prisons are provincial institutions for inmates serving less than two years; penitentiaries are federal institutions for inmates serving two years or more.
- ⁴ See *R. v. Shand* (1976), 30 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Newall et al. (No. 4)* (1982), 70 C.C.C. (2d) 10 (B.C.C.A.); *R. v. Konechny* (1983), 10 C.C.C. (3d) 233; *R. v. Smith* (1984), 11 C.C.C. (3d) 411 (B.C.C.A.); *R. v. Slaney* (1985), 22 C.C.C. (3d) 240; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49.
- ⁵ See, for example, the evaluation of Michigan's mandatory two year add-on sentence for possession of a firearm in the commission of an offence (Loftin, Heumann and McDowall, 1983).
- ⁶ For some offences carrying a mandatory minimum term of imprisonment, the minimum penalty is rarely exceeded. For example, data reveal that of 1307 convictions for use of a firearm (s.83) in 1983-84, all but five received the minimum one year term of imprisonment. (FPS-CPIC data base – see Chapter 9). Although this pattern is not true for all offences carrying a minimum penalty, it is clear that in the case of use of a firearm, the minimum is used more as a mandatory determinate sentence (of one year in prison) than as a “starting point”.

Chapter 9

A New Structure for Sentences of Imprisonment

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Chapter 9

A New Structure for Sentences of Imprisonment

In imposing a sentence of imprisonment, a judge must exercise his or her discretion within the legal framework provided in the legislation. After the judge imposes the sentence, different laws and statutes provide the framework for the way in which the sentence of the court will be carried out.

To achieve a uniformity of approach to sentencing, the laws, practices and principles which govern the imposition of the sentence must be consistent with those governing its administration. In this chapter, the legal framework governing the imposition of sentences of imprisonment will be discussed and, throughout, the implications of this framework for the ways in which the sentence of the court is actually carried out, will be stressed.

The recommendations in this chapter can only lead to a more uniform approach to sentencing if they are implemented as part of the integrated package of proposals. If these proposals are to reflect the importance of understanding sentencing as a process, then they cannot be divided into distinct parts without losing the meaning of the whole.

Maximum penalties set the upper limit of the sentence that may be imposed for all offences. Upon application by the Crown in specified circumstances, judges may exceed that maximum and impose an indeterminate sentence when they find the convicted person to be a “dangerous offender”. In respect of multiple offences, other provisions govern the order in which sentences of imprisonment imposed may be served. In this chapter the proposals for a new structure for sentences of imprisonment will be presented in the following order: first, a review of the maximum penalty structure; second, a re-evaluation of exceptional sentences; and third, a consideration of sentences for multiple offences.

1. Maximum Penalties

The numerous anomalies and inconsistencies with respect to current maximum sentences prescribed for each offence ... require further intensive consideration. Many offences carry the same maxima but are of substantially differing

degrees of seriousness. Other offences with different maxima are perceived to be similar in all other respects.

Sentencing (Canada, 1984; 59)

1.1 The Current Structure: Past and Present

The primary source of guidance for judges, criminal justice professionals and the public as to the relative seriousness of criminal offences and the upper limit on the sentence of imprisonment that may be imposed, is the maximum penalty prescribed for each offence. Few offences carry a mandatory minimum penalty, so for the majority only an upper limit is prescribed. Whether this existing upper limit does in fact provide any guidance (or even reflects current notions of offence seriousness) is a question that had to be addressed by this Commission.

There has never been a comprehensive examination of the maximum penalty structure in the Canadian *Criminal Code*. While some penalties have changed since 1892, the overall structure has remained virtually the same.

As was discussed in Chapter 2, a frequently imposed penalty in the 18th century was the transportation of offenders from England to the colonies (*Friedland, 1985*). According to an English Act of 1717, transportation could be imposed for seven years in almost all cases. In 1842, a statute was enacted which provided that an offender could receive a penitentiary term equal to “any term for which he might have been transported beyond the seas”. It was upon these multiples of seven that James Fitzjames Stephen, the original drafter of what became our *Criminal Code*, based his structure of maximum penalties – a structure that remains in the *Code* today.

Over the past 90 years, a great number of piecemeal amendments have been made to maximum penalties in response to, among other things, shifts in public attitudes regarding the relative seriousness of certain offences. These amendments were not made within the context of a review of the relative seriousness of all offences in the *Criminal Code*, but rather on an offence-by-offence basis ostensibly in recognition of society’s changed notions as to the relative seriousness of crimes.

Part of the impetus for the creation of this Commission came from the recognition that a sentencing structure should not remain static: it should evolve to reflect a changing society. To this end the Commission was enjoined to review the overall framework of sentencing, and to assess the extent to which current penalties reflect contemporary views of Canadians regarding the seriousness of offences. As was stressed in *Sentencing* (Canada, 1984) “one of the questions that must be considered in the fundamental review of criminal sentencing is whether the basic assumptions which led to our current law are still valid today, or whether the enormous change which has taken place in society over the past ninety years requires those assumptions to be reassessed” (p.4).

1.1.1 Terms of Reference

Since a fundamental review of the structure of maximum penalties cannot be achieved through the usual process of amendments to the *Code*, the Government of Canada directed this Commission to undertake the required “intensive consideration”. In the first paragraph of the terms of reference, the Commission was asked, “to examine the question of maximum penalties in the *Criminal Code* and related statutes and advise on any changes the Commissioners consider desirable with respect to specific offences in light of the relative seriousness of these offences in relation to other offences carrying the same penalty, and in relation to other criminal offences”.

As we mentioned earlier in the report, the “related statutes” considered by this Commission are the *Narcotic Control Act* and the *Food and Drugs Act* (Parts III, IV). Although these represent only a fraction of existing maximum penalties, the procedure undertaken by this Commission in relation to these statutes and to the *Criminal Code* could ultimately be applied to all other statutes.

1.2 Concerns

In the legislation, each offence carries a maximum penalty. The current legislative scheme provides the following maximum penalties:

- a) *Criminal Code*
6 months, 2 years, 5 years, 10 years, 14 years, life imprisonment;
- b) *Narcotic Control Act*
6 months, 1 year, 7 years, life imprisonment;
- c) *Food and Drugs Act*
(Parts III, IV) 6 months, 1 year, 18 months, 3 years, 10 years.

According to the current structure the sanction attached to a particular offence is expressed in terms of a certain length of imprisonment. The answer to the question of whether this structure provides any guidance to the public or whether it only serves to further confuse an already complex process seems clear:

This may prove more confusing for the public than for the courts, who at least have the case law principle that the maximum is to be reserved for the worst imaginable case for that particular offence. If the public were to read the *Criminal Code*, or even press reports of sentencing decisions, they could easily be puzzled by the fact that the penalty for a given offence is set out only as a particular length of time in prison. In the words of the *Code*, every one who breaks and enters a dwelling house “is liable to imprisonment for life”, “every one who commits theft involving a sum of property worth over \$200 is liable to imprisonment for ten years” and so on.

Sentencing (Canada, 1984; 24)

Although judges have the benefit of both greater familiarity with the laws and the jurisprudence, existing maximum penalties provide little real guidance

in the most difficult task of determining the appropriate sentence to impose.¹ As stated above, maximum penalties prescribe the length of a sentence of imprisonment to be imposed in the worst imaginable case of that offence. For a number of offences, such as break and enter (private dwelling), a judge may impose any sentence from a suspended sentence and probation to life imprisonment. In the words of the Law Reform Commission of Canada, the high maximum penalties currently in the *Code* place an “unreasonable burden on judges in requiring them to exercise an unnecessarily wide discretion” and in fact current maxima “appear to be disproportionately high, even anachronistic” (Law Reform Commission of Canada, 1975b; 21). It concluded that the maximum penalties in the *Code* could be reduced without unduly limiting the discretionary power of the court, since “in principle discretion should be no greater than necessary and be subject to reasonable guidelines” (Law Reform Commission of Canada, 1975b; 22).

1.2.1 Penalties: A Guide to Practice?

The current maximum penalty structure when viewed in the context of sentencing practice is an even greater source of confusion to the public. Upon this there was great uniformity of opinion across diverse groups. Over two-thirds of sentencing judges, defence and Crown counsel in Canada who responded to the Commission surveys felt that the current system, where the maximum penalty is rarely imposed, gives a false impression of sentencing practice to the public. The same point has also been made by organizations and individuals in submissions to the Commission. The reasons for this will become clear.

The major source of this confusion – and perhaps public dissatisfaction – is the discrepancy between the maximum penalties prescribed by the *Criminal Code* and the sentences actually handed down. Statutory maxima should bear some relation to actual sentencing practice by setting the ceiling for the most serious cases. This does not appear to be true.

How do the current maxima relate to actual practice? Table 9.1 presents a comparison between statutory maxima and sentencing practice², for a select group of offences. This table contains two indices of current practice: the median custodial sentence, and what is known as the 90th percentile of custodial sentences. The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.³ The 90th percentile, on the other hand, is that sentence below which 90% of cases can be found.⁴ To illustrate, the 90th percentile for robbery during this period was seven years. This means that of all offenders who were convicted of robbery *and* who were sent to prison, 90% received terms of imprisonment that were seven years or less. The maximum penalty for robbery is life imprisonment. Only 10% of all those sent to prison for robbery received a sentence in excess of seven years.

Table 9.1
Comparison Between Current
Maximum Penalties and Actual Practice^a
(y = years; m = months)

| Offence | Maximum Penalty | Median ^b Custodial Sentence | 90th Percentile ^c Custodial Sentence |
|-----------------------|-----------------------|--|---|
| Manslaughter | Life | 5y | 12y |
| Attempted Murder | Life | 5y | 14y ^e |
| Robbery | Life | 2y | 7y |
| Break and enter | Life/14y ^d | 6m | 2y |
| Forgery | 14y | 6m | 1y |
| Theft over \$200 | 10y | 4m | 18m |
| Possession over \$200 | 10y | 4m | 2y |
| Fraud over \$200 | 10y | 6m | 2y |
| Assault with weapon | 10y | 3m | 1y |
| Theft of credit card | 10y | 3m | 18m |
| Assault | 5y | 1m | 6m |

^a Source: FPS-CPIC data-base (1983-84) (Source: Canadian Centre for Justice Statistics). These data have been cross-checked with more recent data (Hann and Kopelman, 1986). The similarities between the data sets proved to be greater than the differences.

^b Median = middle sentence, half are above, half below

^c 90th percentile = includes 90% of all custodial sentences

^d Private dwelling = Life; Other premises = 14 years

^e While the 90th percentile for attempted murder exceeded that for manslaughter, the medians were similar.

Even a cursory examination of this table reveals a substantial discrepancy between the statutory maxima and either the median or the 90th percentile custodial sentences. One might not expect the maximum penalties to be close to the medians: the maximum has been reserved for the most serious instance committed by the worst possible offender in the worst circumstances. It is revealing however that the maxima also bear little relation to the 90th percentiles. Thus, while the maximum penalty for breaking and entering a private dwelling is life imprisonment, 90% of those offenders who were imprisoned for this offence received sentences of under two years. In fact, less than half of one percent of cases received custodial terms of over nine years. This pattern of results is not unique to Canada. A similar dissociation between maximum penalties and actual practice has been noted in the United Kingdom (Advisory Council on the Penal System, 1978).

It seems fair to say that the maximum penalties as they currently stand have little impact upon the sentences handed down by judges and only serve to

confuse the public. The worst cases are receiving terms of imprisonment substantially below the most severe penalties prescribed by the *Code*. It is worth noting in this context that fewer than one-quarter of the judges surveyed by the Commission (Research #6) stated that the current maximum penalties guided their sentencing.

1.2.2 Penalties: A Guide to Offence Seriousness?

Besides bearing little relation to sentences assigned to the vast majority of even the most serious cases (those resulting in custody), the current maxima provide little guidance as to the relative seriousness of offences. The principle of proportionality, central to the recommendations of this Commission, requires the severity of penalties (both actual and statutory) to reflect the relative seriousness of offences. No two offences of comparable seriousness should be punishable by maximum penalties of substantially different severity. Likewise, offences of manifestly disparate seriousness should not attract the same maximum or average penalty.

The well-known penal theorist Andrew von Hirsch has brought attention to the role of proportionality in the context of a penalty structure. He notes the importance of two requirements: “the first is the requirement of *parity*. Persons whose criminal conduct is equally serious should be punished equally. The second is the requirement of *rank ordering*. Penalties should be graded in severity so as to reflect gradations in relative seriousness of the conduct” (von Hirsch, 1985; 40). We shall now address the requirement of rank ordering; parity will be discussed in the chapter on sentencing guidelines.

If penalties should be graded in severity so as to reflect gradations in relative seriousness of the conduct, offences carrying the same maximum penalty should reflect a similar level of seriousness. Instead, for example, one finds in the *Criminal Code* that sexual assault with a weapon (s.246.2) carries the same maximum penalty of 14 years as do the offences of possession of housebreaking instruments (s.309(1)) and a public servant refusing to deliver up property (s.297). Numerous examples of the anomalies in the current rank ordering of the offences can be provided. Clipping and uttering clipped coins carries a maximum penalty of 14 years, whereas the setting of traps likely to cause death (s. 231) carries a maximum of five years. Finally, few would wish to argue that the offence of break and enter a private dwelling is on the same level of seriousness as manslaughter, although they carry the same maximum penalty of life imprisonment.⁵ Furthermore, the maximum penalty for break and enter a private dwelling (s. 306(1)(a)) is life imprisonment, whereas assault with a weapon carries ten years (s.245.1).

Certainly the public do not regard break and enter as one of the most serious offences: when asked to “sentence” an offender convicted of break and enter, only 29% chose to incarcerate him.⁶ Nor in fact does it appear to be the case that sentencing judges in this country regard break and enter as an offence deserving of the highest maximum penalty. In fact, in 1983-84,

approximately 40% of convictions for this offence resulted in a fine or other community sanction. Of those more serious cases that resulted in sentences of imprisonment, fully 95% received terms of less than three years.

In order to address these concerns about rank ordering the Commission reviewed, in a comprehensive manner, the maximum penalties prescribed for all the offences (over 300) in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV).

This undertaking involved two major elements. One was to review the maximum penalty bands (i.e. 6 months, 2 years, 5 years, 10 years, 14 years, life imprisonment) and to decide on a “ceiling”: that is to establish the level of the most severe maximum penalty. Currently, that level is life imprisonment. The offences of murder and high treason were excluded from this exercise. (These offences carry mandatory minimum periods of life imprisonment and will be dealt with in the next chapter.) The other element of this review required the Commission to order all offences in terms of their relative seriousness.

In determining levels of maxima and relative seriousness, this Commission reviewed all offences as they appeared in the relevant statutes as of January 1, 1986. It was beyond the scope of the mandate to recommend changes to either the definition of offences or to their appropriateness for inclusion in criminal statutes. This is not to minimize the importance of those tasks; in fact the *Code* is sorely in need of such revision. However, the fact that all offences in the relevant statutes appear in the proposed scheme is not to lend credence to each individual offence. Some offences, such as witchcraft or duelling, are not easily ranked in terms of their seriousness. To have eliminated certain offences, however, would have required a comprehensive review of the *Criminal Code*. This was clearly beyond the purview of this Sentencing Commission, and furthermore is currently being conducted by the Law Reform Commission of Canada.

For reasons of equity, clarity, and predictability, the Commission has structured maximum penalties according to its policy of “real time sentencing” – an attempt to bridge the gap between the sentence imposed by the judge and the administration of that sentence. As stressed earlier, this has implications for all sentences of imprisonment and early release practices.

1.3 Setting the Maximum “Ceiling”

In setting the maximum penalty ceiling, the Commission sought to make the maximum penalty structure reflect, to a greater degree, current sentencing practice. Although maximum penalties would continue to set the upper limit, it was felt that they should no longer be measured exclusively according to the “worst possible case”.

The most severe maximum penalty in Canada today is life imprisonment. The term “life imprisonment” is in most cases, however, a misnomer. Inmates

serving a life sentence rarely remain in custody for life. In fact, for most offences, a life sentence means eligibility for release on parole after serving seven years in custody. (Early release eligibility periods will be discussed in greater detail in Chapter 10 *The Meaning of a Sentence of Imprisonment*). With only a few exceptions, it is the National Parole Board that decides how much of the life sentence will be served in custody.⁷ Hence, a life sentence begins to look more like an indeterminate sentence. Only the minimum time to be spent in custody (e.g., for some, seven years) is known at the time of sentencing. The actual time to be served is decided by the National Parole Board. Once released on parole, a person serving a life sentence serves the sentence in the community under “supervision” for the remainder of his or her life.

Since maximum penalties, as defined in the *Criminal Code*, provide neither a reliable indication of the meaning of sentences nor an adequate indication of the nature of current sentencing practices, the Commission sought to uncover the sentences actually imposed on those offenders currently serving the longest terms in federal penitentiaries.

In order to do so, the Commission obtained an aggregate sentence breakdown of all federal offenders serving sentences in excess of 10 years. By aggregate sentence we mean the following: if an offender is admitted to a federal institution with a two year sentence for robbery and an additional one year sentence for possession of a restricted weapon, this would be recorded as a three year term for robbery. This point must be borne in mind when considering these data.

Approximately 9% of the total federal prisoner population, (excluding offenders serving life-terms) are serving aggregate terms in excess of ten years. This means that of those inmates who are serving a sentence of over two years, only 9% are serving over 10 years in custody. The average aggregate sentence of offenders in this category is 16 years, but this is misleading, for it suggests that judges are sentencing offenders to long terms for single offences. The reality is that over three-quarters of offenders in this category received multiple sentences.⁸ The sentences of almost all long-term offenders reflect multiple offences.

Examination of the most severe sentence imposed upon these individuals revealed the following: the average single longest sentence was 12 years. The average single sentence accorded the worst offenders in the penitentiary system is still substantially below the most severe maximum penalties prescribed by the *Code*.

The Commission took a closer look at a still smaller group of federal inmates: those who had actually served 12 years in federal penitentiaries, and who were still in custody at the time of the study. It was possible that these individuals were ones whom judges had sentenced to very long terms (e.g., 20 years) and who to this point had been denied parole. This possibility would be consistent with a model of sentencing practice in which judges regularly impose

sentences near the maxima prescribed by the law. Reality showed this model to be wrong. Most of these offenders would have been released by now had they not accumulated additional time prior to release from their institutions. This additional time came about through convictions for offences committed *in the institution*, for attempted escapes and for offences committed while on some form of temporary release. It is the repetitive nature of their records as much as the severity of the particular offence for which they were initially sentenced that is responsible for their protracted detention in prison.

To conclude, in reviewing the records of long-term prisoners three findings emerged which had significance for the task of setting a new maximum ceiling. First, offenders serving more than ten year terms constitute a small percentage of the total federal inmate population. Second, almost all these offenders are serving aggregate sentences. Third, frequently these long-term aggregate sentences represent not only the sentence imposed for the initial offences of conviction, but also sentences for subsequent offences committed in the institution.

1.3.1 Proposals

Having considered the data on the length of time actually served in custody by long-term offenders and in consideration of other aspects of our sentencing proposals, the Commission concluded that 12 years in prison should be the maximum sentence to be imposed for a single offence in all but the most exceptional cases. In recognition that there are particular cases that require exceptional sentences, there is a procedure of “enhancement” of the sentence, to be described later in this chapter.

The 12 year ceiling applies to those offences, other than murder and high treason, ranked as the most serious.

9.1 For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:

- 12 years**
- 9 years**
- 6 years**
- 3 years**
- 1 year**
- 6 months**

Once the “ceiling” was set at 12 years, the Commission decided that intervals of three years would provide the necessary flexibility and differentiation between the levels of maxima in the upper ranges. It was felt necessary to retain the lowest band of six months, as one year was perceived to be excessive for the least serious group of offences which comprise the bulk of the criminal court workload.

1.3.2 The Meaning of the Maximum Penalty Ceiling

According to the Commission's recommendations, the maximum penalty of 12 years may only be exceeded by a judge if there is a finding that, according to strict criteria, this offence warrants an "exceptional sentence", or where the sentence has been imposed in respect of convictions for multiple offences. These two exceptions will be discussed in detail in later sections of this chapter.

Perhaps most importantly, the meaning of the maximum penalty ceiling can only be understood in the context of the overall meaning of a sentence of imprisonment. As will become clear in the next chapter, the meaning of a sentence of imprisonment is determined, to a large extent, by early release practices. The proposals regarding maximum penalties must therefore be considered as only one part of the integrated set of reforms that will be proposed by this Commission. Taken alone, the proposals regarding maximum penalties would be deprived of their meaning.

Finally, it is important to remember that currently available data reflect sentencing trends under the present sentencing structure. This includes discretionary release on full parole. Of those offenders who are denied parole, or refuse to apply, almost all will be released on mandatory supervision after serving two-thirds of their sentences in prison. The sentencing proposals of this Commission include the abolition of discretionary early release on parole, and a reduced period of earned remission. Thus a 12 year sentence under the new schedule will be a more severe penalty than a 12 year sentence at the present time. As well, the 12 year ceiling would capture almost all long-term offenders and as discussed later, those few remaining could be subject to enhanced sentences.

Even though we have proposed a reduced "ceiling" for maximum penalties, long periods of imprisonment would still be available for the most serious offences. For example, a sentence of 12 years for a very serious case of manslaughter would mean that the offender would serve at least nine years in custody before release, if he or she earned all their remission credits. How does this compare to current sentencing practice? The most recent data on sentences for manslaughter show that 90% are 10 years or less (Hann and Kopelman, 1986). In the existing sentencing scheme however, one has to take into account parole and release on mandatory supervision. Of these cases approximately 60% will be released on parole (Solicitor General's Study of Conditional Release, 1981, Table A-21). The remainder (except those serving life sentences) will be released on mandatory supervision after serving an average of six and a half years in prison. The most severe sentences proposed here are then really harsh, both in terms of the proposed scheme and current practice.

1.4 Offence Ranking According to Relative Seriousness

The offence ranking exercise involved the rank ordering, according to their seriousness, of over 300 offences in the *Criminal Code*, *Narcotic Control Act*

and *Food and Drugs Act* (Parts III, IV). Ranking all the criminal offences under consideration by this Commission was a complex and time-consuming exercise. As in determining the scale of maximum penalties, reference had to be made to policy, theory and data on sentencing practice.

The ranking also drew upon the diverse experiences of the Commissioners, the findings of public opinion research, similar exercises by sentencing commissions in other jurisdictions, and research on the penalty structures in other countries. Thus it was a multi-stage process in which the subsequent ranking was refined to reflect these diverse sources of information. The final step involved a comparison between the ultimate ranking by the Commissioners and rankings derived from members of the public. This revealed a high degree of consistency between the two populations⁹. Hence, although one can never say with empirical certainty that a certain crime is worse than another in all circumstances, some consensus exists on the perceived seriousness of different offences¹⁰. The exercise of creating new levels of maximum penalties required consideration of policy, theory, and empirical evidence as to current sentencing practice. In proposing the 12 year ultimate maximum penalty for all but exceptional cases or multiple offences, the Commission recognizes that it is difficult to conclude with certainty that importing narcotics, for example, deserves a 12 year term of imprisonment and that any particular offence “deserves” any particular punishment. What we can say is that based on our theory of sentencing and given the other reforms proposed by this Commission, 12 years for example, appears to be the most appropriate maximum penalty for importing narcotics.

1.4.1 Proposals

In the final ordering, offences involving violence which result in serious harm to persons attracted the most severe maximum penalties. Economic crime (e.g., large-scale frauds) and organized crime also attracted severe penalties, although less severe than crimes against the physical well-being and security of individuals. Offences against property, public morals, some sexual offences (e.g., gross indecency), some offences against public order and transactional crime between consenting parties (e.g., gaming and betting) attracted lower maximum penalties. The complete list of all offences and the proposed corresponding maxima is set out in Appendix E. Table 9.2 provides some examples of each category.

Table 9.2

**Representative Examples of Offences from
Proposed Maximum Penalty Schedule**

| Proposed Maximum Penalty | Offence Description and Examples |
|--------------------------|--|
| 12 years | Most serious offences other than murder: e.g., manslaughter; attempted murder; aggravated sexual assault; kidnapping; importing narcotics; |

| | |
|----------|--|
| 9 years | Other violent and very serious offences: e.g., robbery; extortion; causing bodily harm with intent; sexual assault with weapon; arson; |
| 6 years | Serious property offences and crimes against the person: e.g., theft over \$1000; assault causing bodily harm; break and enter dwelling house; prison breach; sexual assault; |
| 3 years | Crimes against property, other offences: e.g., public mischief; break and enter business premises; theft from mail; pointing firearm; bestiality; advocating genocide; |
| 1 year | Less serious offences: e.g., common nuisance; theft of credit card; falsifying documents; assault; resisting arrest; |
| 6 months | Least serious offences: e.g., gaming and betting; soliciting; theft under \$1000; fail to appear; unlawful assembly; indecent acts; possession of stolen property, under \$1000. |

1.4.2 Proposed Maxima and Current Practice

We have already referred to the relationship (or absence of one) between current practice and current maximum penalties. How do the proposed maxima relate to current practice? For a sample of offences, Table 9.3 compares these proposals with two indices of current practice: the median and the 90th percentile. The proposed maximum penalties are designed to address the majority of cases. As Table 9.3 shows, these proposed maxima include 90% of sentences currently imposed.

Table 9.3

Comparison Between Proposed Maximum Penalties and Current Custodial Sentences Imposed by Courts

| Offence | (y = years; m = months) | | |
|---------------------------------|--------------------------|---|---|
| | Proposed Maximum Penalty | Current Median Custodial Sentence Imposed | Current 90th Percentile Custodial Sentence ^a Imposed |
| Manslaughter | 12y | 5y | 12y |
| Attempted murder | 12y | 5y | 14y |
| Kidnapping | 12y | 4y | 12y |
| Causing bodily harm with intent | 9y | 1y | 5y |
| Robbery | 9y | 2y | 7y |
| Extortion | 9y | 1y | 3y |
| Sexual assault, weapon | 9y | 3y | 8y |
| Forgery | 6y | 6m | 1y |
| Theft over \$1000 | 6y | 4m | 18m |
| Fraud over \$1000 | 6y | 6m | 2y |
| Assault with weapon | 6y | 3m | 1y |

| | | | |
|--|----|-----|-----|
| Sexual assault | 6y | 6m | 3y |
| Forcible confinement | 6y | 2y | 6y |
| Public mischief | 3y | 1m | 4m |
| Possession of house-breaking instruments | 3y | 1y | 3y |
| Assault | 1y | 1m | 6m |
| Assault police officer | 1y | 2m | 6m |
| Fraudulently obtaining food & lodging | 6m | 1m | 6m |
| Theft under \$1000 | 6m | 3m* | 1y* |
| Fraud under \$1000 | 6m | 3m* | 1y* |

^(a) Source: FPS-CPIC data-base (1983-84)

* Based on data for offences proceeded with by indictment

The 90th percentile for the sentences imposed in the case of attempted murder seems to be over the 12 year ceiling (14 years). However, according to the most recent research project on sentencing data (Hann and Kopelman, 1986; 24, Report on Murder and Related Offences), the 90th percentile for attempted murder would be lower, i.e. 10-12 years. Hence the 12 year ceiling really encompasses at least 90% of sentences for all offences, except murder and high treason.

The proposed maxima are still consistently higher than current practice. This is clear from an examination of the two primary sources of sentencing statistics available to the Commission. In the Correctional Sentences Project (Hann and Kopelman, 1986) 90% of custodial terms were less than ten years. In the data-base provided by the Canadian Centre for Justice Statistics (FPS-CPIC) the 90th percentile was slightly higher: 12 years. This general observation also applies to particular offences, such as theft over \$1,000. The proposed maxima is six years. Data from the custodial sentences project shows a 90th percentile of one year. The FPS-CPIC data base showed a 90th percentile of 18 months. While the proposed maxima are lower than the maxima which exist today, they still provide the scope to deal with all cases in a way consistent with current practice.

1.4.3 Proposed Maxima and Maxima from Other Jurisdictions

As part of its research activities the Commission compiled comparative penalty data from other jurisdictions. This was not always possible – definitions of criminal acts vary almost as much as the acts themselves. Table 9.4 however, presents some comparisons, which illustrate that (a) there is considerable variation in the maximum penalties prescribed in different countries, and (b) that generally speaking, the Commission's proposals are not out of line with the maxima which exist elsewhere. On this last point the reader is reminded that the maximum penalties proposed by the Commission do not include any provision for discretionary parole release. Accordingly, a six year maximum under the proposed scheme is a more severe penalty than a six year sentence under the old scheme or another derived from a jurisdiction which retains parole.

Table 9.4

**Comparison of Current Maxima, Proposed
Maxima and Maxima from other Jurisdictions
(Selected Offences)***

| Offence | Current Maximum | Proposed Maximum | United Kingdom | British Advisory Council ^a | United States ^b | Sweden | France | Netherlands |
|---|--------------------|---------------------|-------------------|--|-------------------------------|--------|--------|-------------|
| Manslaughter | Life | 12 | Life | Life | 10 | 10 | 15 | 15 |
| Attempted Murder | Life | 12 | 10 | Life | 10 | Life | Life | 10 |
| Kidnapping | Life | 12 | Life | 7 | Life | Life | Life | 12 |
| Robbery | Life | 9 | Life | 6 | Life | 10 | Life | 15 |
| Extortion | Life | 9 | 14 | 5 | 5 | 6 | 10 | 9 |
| Arson | 14 | 9 | Life | 5 | 10 | Life | 20 | 15 |
| Perjury | Life/14 | 9 | 5 | 7 | 2 | 8 | 10 | 3 |
| Aggravated Assault | 14 | 9 | Life | 5 | 10 | 10 | 15 | 6 |
| Assault with a Weapon | 10 | 6 | 14 | 5 | 1 | 2 | 4 | 4 |
| Sexual Assault | 10 | 6 | * | 7 | 2 | 4 | 5 | 8 |
| Theft Over \$1000 | 10 | 6 | 10 | 3 | 5 | 6 | 3 | 6 |
| Forgery | 14 | 6 | Life | 3 | 10 | 6 | Life | 5 |
| Use of Firearm in Commission of Offence | 14 | 6 | 14 | * | * | 2 | * | 4 |
| Public Mischief | 5 | 3 | * | 3 | 1 | 2 | 5 | 6 |
| Assault | 5 | 1 | 1 | 1 | 3m | * | 2 | 6 |
| Fraud Under \$1000 | 2 | 6m | 10 | 3 | 5 | 6 | 5 | 4 |
| Current imprisonment rate per 100,000 population | 108 | | 97 | | 287 | 49 | 72 | 34 |

* = either no equivalent or a variation in definition prevents direct comparison

^a = Proposal of the British Advisory Council on Maximum Penalties (1978)

1.5 Effects of Maximum Penalties on Public Perceptions

Maximum penalties as well as actual sentences, it is said, guide public views of the seriousness of offences. This *declaratory* function of penalties anticipates that people derive their views of how serious offences are – in part at least – by referring to the penalties prescribed for those offences.

It is this reasoning which has, in the past, provoked opposition to reducing penalties. The argument runs that, by so doing, people will view the crimes in question as either morally less wrong or less serious. If this were the case, one might want to proceed cautiously when lowering penalties. This Commission has recommended lowering the maximum penalty for common assault from five years to one. It was not the intention to convey to the Canadian public a message that assault is now regarded as a less serious offence than was previously the case. If the public do derive perceptions of seriousness from statutory maxima, this might be one undesirable effect of lowering the maximum penalties in the *Code*.

As it happens, there seems to be little evidence that statutory maxima affect public perceptions of crime seriousness. This was apparent from a literature review and the results of original empirical work, both of which were carried out by the Commission research staff.

For one thing, as is apparent from Chapter 4, the public have little accurate idea of existing maximum penalties. It is hard to argue that public perceptions of offences are affected by statutory maxima when most people don't know what those maxima are even when the penalty for an offence is the object of extensive media coverage. In addition to this fact, there is other evidence to support this position. In a nation-wide poll (Research #3) respondents were asked to rate the seriousness of impaired driving relative to other offences in the *Code*. Prior to this rating half the respondents were told about the new, harsher penalties for this offence, for which a convicted offender can now receive five years in jail. The other half of the sample received no such information. If peoples' views of the seriousness of offences are affected by maximum penalties, we would expect the group receiving the information about the new penalties to rate the offence as being more serious. This was not the case. There were no differences between the groups. Of course there remains the possibility that the public would regard an offence as being less serious if they knew that the penalty had decreased in severity. This experiment only tested the other half of the proposition that raising the penalty would inflate seriousness ratings. The evidence seems to indicate however, that public views of the seriousness of offences are not derived from the maximum penalties prescribed for those crimes. It does not seem likely, then, that the Canadian public will regard crimes as being less serious if the maximum penalties prescribed for those crimes are lowered.

1.6 Maximum Penalties as Part of an Integrated Set of Sentencing Reforms

Finally, it is necessary to end this discussion of maximum penalties with a most important caveat. The maximum penalties proposed by this Commission are substantially lower than those currently prescribed by the *Code*. Even if the exact amount by which sentence lengths (as opposed to lengths of time actually served) will be shortened is hard to estimate, one thing has got to be clear: sentences must be reduced to take into account the Commission's proposals regarding early release.

The sentencing reforms advocated by this Commission reflect recognition that changes to one part of the sentencing process will affect all other parts. One of the Commission's recommendations regarding early release calls for the abolition of parole. If this step were taken without some concomitant reduction in sentence lengths, our prisons would be strained beyond capacity. Prison occupancy exceeds 100% in many institutions right now. Thus if discretionary parole release were to be abolished without a reduction in sentence length, the extra demand for cells would quickly stress the system beyond its capacity to function.

1.7 Hybrid Offences

Like the current bands of maximum penalties in the *Code*, the current classification of certain offences as "hybrid" is more the result of historical accident than any systematic design. Hybrid offences carry two maximum penalties: the lower penalty applies if the offence is dealt with by way of summary conviction, the higher one applies if it is proceeded with by indictment. For example, the offence of sexual assault carries a maximum penalty of six months (summary conviction) or ten years (indictable).

Whether a hybrid offence is proceeded with summarily or by way of indictment is a decision typically made by Crown counsel. The classification of an offence as summary or indictable determines a number of procedural incidents such as the mode and place of trial, the mode and routing of appeals and the applicability of the *Identification of Criminals Act* (fingerprinting the accused). In addition, the choice of whether to proceed summarily or by indictment has other consequences (e.g., whether a fine may be imposed in addition to, or in lieu of, other punishment).

According to the principle of proportionality and for reasons of greater equity, clarity and predictability of procedure, this Commission is of the view that the classification of offences as hybrid should be abolished.

9.2 The Commission recommends that hybrid offences be abolished and reclassified as offences carrying a single maximum penalty of 6 months, 1 year, 3 years, 6 years, 9 years or 12 years imprisonment.

The Law Reform Commission of Canada is studying the classification of offences, which will be the subject of a future report. There are a number of procedural incidents which will result from any new structure of offences and which will have to be addressed. For example, the question of whether the option of a jury trial should be available to all those convicted of indictable offences would have to be resolved within the context of any new classification scheme. The lowest maximum level recommended by this Commission for the more serious offences (i.e. three years) may well be an appropriate threshold at which to grant the right to a jury trial.

Finally, the Commission's recommendation regarding the elimination of the current classification system is consistent with the principle of accountability, discussed in greater detail in the chapter on the exercise of prosecutorial discretion (Chapter 13).

2. Exceptional Sentences

The Commission has proposed that a sentence of imprisonment of 12 years should, for all offences except murder and high treason, be the most severe maximum penalty prescribed by the *Code*. This decision was made subject to one important caveat: that the Commission would also propose a special procedure to allow the sentencing judge to impose a custodial term in excess of the highest maximum for exceptionally heinous crimes.

The Commission will also recommend a process by which a judge may impose a penalty in excess of the maximum penalty in cases of sentencing an offender for multiple offences. This proposal will be discussed in the next section, *Sentences for Multiple Offences*.

Although the Commission sought to develop a structure that would allow for a longer term of incarceration to be imposed for those rare heinous crimes, the procedure itself has to be exceptional in order that these exceptional crimes do not dictate the maxima for the more common occurrences of the same crime.

As will become evident in the course of this section, the legislative history of exceptional sentences is a history of indeterminate sentences. Indeed, the history of a special procedure to allow judges to depart from normal sentencing practice reflects a belief in the ability to predict future behaviour and in the ability to "cure" criminals. Not only has this model of sentencing been the cause of much debate, but more importantly, it is a model which has as its basis a theory of sentencing that is antithetical to the sentencing structure proposed by this Commission.

2.1 Indeterminate Sentences

Under the current law, there exists one mechanism which gives judges, on application of the Crown with consent of the Attorney General, the power to

impose an indeterminate term of custody which may exceed the maximum sentence prescribed in the *Code* for the offence of conviction. Part XXI of the *Criminal Code* empowers the court to impose a sentence of indeterminate length once it has found the offender to be “dangerous”.

The dangerous offender legislation was enacted in 1977 to replace former provisions for “habitual offenders” and “dangerous sexual offenders”. Although some changes have been made over time to the procedure and criteria which must be followed before a judge may impose an indeterminate sentence, the basic thrust of the legislation has remained the same. The dangerous offender legislation gives the court the power to impose an indeterminate sentence of imprisonment on those offenders who commit a “serious personal injury offence” and *who meet other criteria centred around the prediction of future behaviour*. Where the court imposes an indeterminate sentence, the parole board is required to review the inmate’s case three years after the sentence is imposed, and every two years thereafter, to determine whether parole should be granted.

There are two elements of the dangerous offender legislation that are an exception to general criminal law principles. First, the indeterminate nature of the custodial sentence, and second, the primary focus on the offender rather than the offence.

The thrust of our proposals regarding sentences of imprisonment has been toward a system of real-time sentencing consistent with the principle of proportionality. Indeterminate sentences offend this concept even more than current mechanisms for discretionary release on parole. To the public, an indeterminate sentence may mean life in custody. To the offender, it may mean the possibility of release after three years.

2.2 Offence-related Criteria

The Commission has already decided that among the principles of sentencing, priority would be assigned to proportionality. Proportionality implies that the focus of sentencing should be the blameworthiness of the conduct rather than the character of the offender, or worse, predictions about his future behaviour. Consequently, no special sanction should be triggered only or primarily by reference to the offender’s character and propensities. As stated in *Sentencing* (Canada, 1984; 28):

Criminal law generally punishes people for what they actually did in the past. The dangerous offender provisions, on the other hand, incarcerate people for what they might do in the future. Many ... critics object to the requirement for psychiatric evidence, stating that the human sciences are simply unable to predict future behaviour at the level of the individual with any degree of confidence. In fact, the evidence indicates a large degree of over-prediction of future violence.

2.3 Sentencing Practice

The current dangerous offender legislation has been criticized extensively (for a review of these criticisms and other relevant issues, see Webster, Dickens

and Addario, 1985). For example, it is unclear why offenders designated as “dangerous” have been singled out. In terms of the extremity of violence displayed in the commission of an offence, there is actually little to set this group apart from many other inmates in the general penitentiary population.

The authors note: “Factors other than the labelled offenders’ behaviour appear to be used in the process of designating one offender as more dangerous than another” (p. 143). Also, it appears that the dangerous offender provisions have not been consistently applied across the country. Of the 32 offenders thus designated as of 1982, 18 were sentenced in one province (Ontario). To quote Webster et al., once again: “This suggests that factors such as community sentiment or local sensitivity to a particular offence or offender, or the disposition of the particular Crown Attorney may determine if an application is brought” (p. 144).

2.4 Proposals

The maximum penalties proposed by this Commission were not set exclusively with reference to the sentence to be imposed in the worst possible case. In setting the proposed maximum penalty levels, Commissioners sought to construct policy for the vast majority of cases. It was nonetheless recognized that the most serious occurrences, albeit very few in number, might require a special procedure to allow an enhancement of the sentence. The exceptional sentence proposal was formulated as a determinate sentencing structure to accommodate that very limited number of cases (fewer than 1% of the most serious cases) where the judge feels that in the interests of security, a custodial term longer than the maximum penalty period is necessary. The exceptional sentence was also formulated to replace the current system of indeterminate sentencing with a determinate sentencing structure.

9.3 The Commission recommends that the dangerous offender provisions in the *Criminal Code* be repealed.

9.4 The Commission recommends that, according to explicit criteria, the court be given the power to impose an exceptional sentence exceeding the maximum sentence for specified offences by up to 50%, following the procedure specified in this report.

2.4.1 Meaning of an Exceptional Sentence

The qualifying offences for exceptional sentences will include only offences which, under the new proposals, carry a maximum of 12 or 9 years. The exceptional sentence differs from a normal sentence in two basic ways. First, remission credits do not apply to any part of an exceptional sentence. The offender serves what is referred to as “straight time”. Straight time means that the length of the term of imprisonment prescribed by the sentencing judge is the time actually spent in custody: the offender receives no early release or

remission credits. Second, the court may impose a sentence exceeding the maximum penalty by fifty percent. For example, if the offence of conviction carries a maximum penalty of 12 years and if the circumstances of its commission satisfy the criteria for the imposition of an exceptional sentence, the judge may impose such an exceptional sentence of 12 years “straight time” plus an “enhancement” of up to an additional 6 years, to which no remission credits apply. It is important to realize that the sentencing judge does not have to exceed the maximum penalty of 9 or 12 years by more than one day in order to impose a longer term of custody on an offender. Since no remission credits apply to exceptional sentences, imposing the maximum penalty plus one day as an exceptional sentence implies in itself that the offender will be incarcerated for a longer period of time, since he or she cannot earn any remission credits.

2.4.2 Criteria

The qualifying offences must meet the following criteria before being eligible for an enhancement:

The offence of conviction is a “serious personal injury offence” carrying a maximum penalty of 12 or 9 years of imprisonment

- and -

is of such a brutal nature as to compel the conclusion that the offender constitutes a threat to the life or safety or physical well-being of other persons

- or -

forms a pattern of serious repetitive behaviour by the offender showing a failure to restrain his behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others.

A “serious personal injury offence” is an offence involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person.

2.4.3 Procedure

If the threshold criteria are met, the prosecutor may make an application, after conviction, seeking an exceptional sentence.

Such an application may only be made where the prosecutor has served notice to the accused or his or her counsel, before plea, of the intention to make application for an exceptional sentence in the event of conviction. This notice would outline the basis on which this application would be made.

In addition to other requirements, the prosecutor shall obtain and file the consent, in writing, of the Attorney General of the province in which the offender was convicted.

Where the court is considering imposing an exceptional sentence, the court shall require a pre-sentence report.

The Crown shall have the burden of proving beyond a reasonable doubt that all the conditions precedent to the imposition of an exceptional sentence have been met.

Where the Crown proves beyond a reasonable doubt that all the criteria have been met, the judge *may* impose an exceptional sentence.

Where an exceptional sentence is imposed, the judge must provide reasons setting out how the criteria were met and why the exceptional sentence was justified in this case.

In setting the enhanced term the judge shall specify the length of time to be served in custody after the expiry of the “straight” portion of the sentence (e.g., 12 year maximum plus 4 year enhancement = 16 years in custody.)

There shall be no remission on any part of an exceptional sentence (i.e. neither on the “straight time” portion nor the “enhanced” portion).

After serving the mandatory straight time (i.e. the maximum penalty for the offence of conviction) the inmate is entitled to a review of the enhanced portion of the sentence.

A review will take place before a court of the same level as the sentencing court that imposed the enhancement.

Upon review, the burden will rest on the offender to satisfy the court that he or she is fit for release.

At the review hearing, the judge shall set the time and conditions of release.

Where release is refused, the offender shall be entitled to a further review in two years, and so on every two years where custody is maintained.

There shall be a right of appeal by the accused where an exceptional sentence is imposed and by the Crown where the court refuses to do so. Both the accused and Crown may appeal the length of the enhanced term imposed.

2.5 Discussion

In rejecting the indeterminate sentence and in emphasizing the need for certainty, the Commission sought to construct an exceptional sentence provision that was both more determinate and predictable.

The aim of the exceptional sentence is to provide a special procedure to deal with the occurrence of a crime in circumstances that society finds most

abhorrent. Restraint calls for selectivity in choosing those offences that are eligible for enhanced sentences, as well as setting strict criteria and procedural requirements which must be met before an exceptional sentence can be imposed.

The criteria were constructed with reference to criteria set out in the Criminal Law Reform Act, 1984 (Bill C-19). Although the context in which these criteria are proposed is different, the Commission was satisfied that they are broad enough to cover the most heinous crimes but narrow enough to ensure restraint in the use of the provision. The criteria are primarily offence-oriented and although some offender characteristics (such as culpability) are relevant factors in judging the gravity of the offence, the focus is no longer on future behaviour.

The requirements for the written consent of the Attorney General and the notice to the accused that the prosecution is making application for an exceptional sentence should have the effect of further limiting the use of these provisions as well as ensuring that the decision to proceed is given the fullest consideration.

The issue of whether to impose an exceptional sentence should be dealt with by the sentencing judge at the normal sentencing hearing. If all the procedural requirements are met, the judge may impose an exceptional sentence – that is he or she may impose a sentence that exceeds the maximum penalty (of 12 or nine years) by a maximum of 50%.

To illustrate how the exceptional sentence is pronounced by the judge, take for example a heinous case of attempted murder. Attempted murder is a “qualifying” offence; it carries a proposed maximum penalty of 12 years. If the criteria and other procedural requirements are met and the judge feels an exceptional sentence is the only appropriate one, a flat sentence of 12 years may be imposed with an enhancement of up to six years. Under normal circumstances, the longest time anyone would serve in custody for attempted murder pursuant to our proposals would be the maximum of 12 years minus one-quarter if remission is earned – totalling nine years. Since remission cannot be earned on any part of the enhanced sentence, the enhancement allows the judge in rare circumstances to impose a custodial term twice as long as allowed for under the regular sentencing procedure ($12 + 6 = 18$ years). Given the magnitude of the potential enhancement, the Crown must prove the necessity for an exceptional sentence beyond a reasonable doubt (as is currently the case in dangerous offender proceedings). The criteria will not easily be proved at this threshold, but nor should they be, given the magnitude of the increment achieved. The judge is also required to provide reasons for the imposition of the exceptional sentence.

Following the same example, suppose the person convicted of attempted murder received a sentence of 12 years flat and three years enhancement, for a total sentence of 15 years imprisonment. The warrant of committal would expire at the end of 15 years. However, in recognition of the extremely long

period that must be served in custody, the inmate will be entitled to a review of the enhanced portion of the sentence at the normal maximum penalty date (12 years).

The review will be conducted by a court at the same level as the sentencing court. The judge reviews the enhanced portion of the sentence only (the three year custodial term not yet served) and considers the necessity for continued custody during the period of enhancement (the warrant expiry date remains the same, but early release on conditions or day release may be ordered). If the inmate satisfies the court that he or she is fit for release on conditions, the judge will set those conditions according to specified criteria (see Chapter 10, section 2.3). Where release on conditions is denied, the inmate shall be entitled to a review in two years – after serving 14 years of the 15 year sentence.

2.6 Conclusion

Although these recommendations include a special procedure to allow the court to extend the term of custody beyond the 12 year maximum ceiling, two important factors must be borne in mind.

First, by its very nature any exceptional procedure will add a degree of uncertainty to the sentencing process since it is by definition a way of going outside normal sentencing procedure. The preamble to the Commission's mandate states that "...certainty [is a] desirable goal of sentencing law and practices". In paragraph (c)(i) of its mandate, the Commission is directed "to investigate and develop separate sentencing guidelines for different categories of offences and offenders". The recommendations in this area have attempted to balance the need for certainty and equity with the requirement for an exceptional sentence for the most heinous offences.

Second, the term "exceptional" must be taken literally. This procedure for enhancement should be reserved for only the most heinous crimes which demand a longer period of incapacitation for security reasons. In order to ensure that only exceptional cases will be subject to an enhanced custodial sentence, the number of qualifying offences is limited to those contained in the two most serious levels of maxima.

Finally, in setting the criteria for the imposition of an exceptional sentence, attention is focused on the offence of conviction, not primarily on the anticipated future behaviour of the offender.

3. Sentences for Multiple Offences

3.1 Definitions

The Commission has defined the term "multiple offences" to encompass two situations. The first, it has called the "single transaction" case which

consists of several charges arising out of a single criminal transaction, e.g., an offender who breaks into a residence, assaults the occupant and damages the premises. The second type of multiple offence involves “a string of offences” whereby several offences arising out of separate criminal transactions are disposed of before the same court at the same time. For example, the court may decide to impose consecutive sentences where the offender is being sentenced at one time for breaking and entering a dwelling house, a robbery and an assault, all of which were committed on different days.

As will be discussed in greater detail below, there are two legal mechanisms currently used by the courts to sentence offenders convicted of multiple offences: concurrent sentences and consecutive sentences. Concurrent sentences are separate sentences imposed for two or more offences which are served simultaneously. Thus, where imposed at the same time, the total time served by the offender for all the offences is not more than the longest individual sentence imposed. Consecutive sentences are sentences imposed for separate offences which run in succession. Thus, the combined length of the sentences is the sum of the individual sentences added together.

3.2 Issues Respecting Concurrent/Consecutive Sentences

There are a number of problems which arise in the current use of consecutive and concurrent sentences. They underline the necessity of determining whether the continued use of these sentences is consistent with the sentencing goals of equity, clarity, uniformity and accountability. One problem which has been extensively reviewed by Richard Ericson, concerns the police practice of multiple charging for the purpose of giving greater leverage to Crown counsel in plea negotiations.¹¹ Although there does not appear to be a conclusive link between the availability of consecutive and concurrent sentences and police over-charging, it is interesting to note that most long-term offenders were subject to aggregate sentences.

Second, the artificial breakdown of a criminal transaction for the purpose of generating numerous charges undermines the principle of proportionality. The absence of national standards respecting police charging practices and the exercise of prosecutorial discretion militates against controls on inappropriate multiple charging. It should be clearly understood that in making this statement the Commission is not implying that all multiple charges are products of unconscionable charging practices.

A third problem concerns the lack of public knowledge respecting concurrent and consecutive sentences. A national survey conducted for the Commission confirms that a substantial portion of the public does not understand the difference between these two sentences (Research #2). This is hardly surprising given both the complexity of this area of law and some of the sentencing dispositions which result from its application. It would seem that clarity in sentencing would be considerably enhanced by giving a total sentence of a particular length, e.g., 12 years for multiple offences rather than by giving

three concurrent sentences of 12 years. Also, the use of consecutive and concurrent sentences, particularly in combination with each other, adds complexity to criminal record-keeping and to the determination of conditional release dates. The interpretation of directions on warrants of committal respecting consecutive and concurrent sentences has created difficulties for sentence administrators. In fact, in some instances, parties have resorted to litigation to resolve the complexities of sentence computation.¹²

Two additional problems relating to consecutive and concurrent sentences for multiple offences are variation in the rules respecting when a consecutive, as opposed to a concurrent sentence, is to be imposed and distortions in the rules relating to concurrent and consecutive sentences resulting from the application of the totality principle. Both of these issues will be examined in the following discussion on the current legal provisions and practice governing multiple offence sentencing.

3.3 The Current Approach

The legal authority to impose consecutive sentences has been the subject of judicial analysis. The Supreme Court of Canada established in the case of *R. v. Paul*¹³ that the power to impose a consecutive sentence must be found in some federal enactment, such as the *Criminal Code*. Subsection 645(4) of the *Criminal Code* outlines three instances in which consecutive sentences may be imposed. The first two subsections do not deal with sentencing for multiple offences *per se* and thus will be dealt with at the end of this part. The focus of discussion will be on subsection 645(4)(c) and particularly on paragraph 645(4)(c)(ii) which deals expressly with multiple offence sentencing.

Paragraph 645(4)(c) provides as follows:

(4) Where an accused

- (c) is convicted of more offences than one before the same court at the same sitting, and
 - (i) more than one fine is imposed with a direction in respect of each of them that, in default of payment thereof, the accused shall be imprisoned for a term certain,
 - (ii) terms of imprisonment for the respective offences are imposed, or
 - (iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence with a direction that, in default of payment, the accused shall be imprisoned for a term certain,

the court that convicts the accused may direct that the terms of imprisonment shall be served one after the other.

An examination of subsection 645(4)(c) shows that only paragraph 645(4)(c)(ii) deals with the imposition of multiple terms of imprisonment

which are not tied to fine default. The other two paragraphs contemplate prison terms imposed for fine default which are activated subsequent to the initial sentencing hearing. These paragraphs will be dealt with later.

The primary focus of the Commission's recommendations respecting sentencing for multiple offences thus concerns terms of imprisonment imposed for more than one offence pursuant to paragraph 645(4)(c)(ii) of the *Criminal Code* whether those offences constitute a "single transaction" or "a string of offences".

3.3.1 Concurrent Sentences

Concurrent sentences imposed for multiple offences serve two principal functions. First, they permit the court to give proportionate sentences for related offences without disturbing the overall length of the total sentence imposed. Thus, they counter any need to reduce sentencing dispositions for individual offences in order to achieve an overall just result. Second, concurrent sentences also serve a denunciatory function since their use denounces criminal conduct without increasing the overall sentence.

Generally, concurrent sentences are imposed for multiple offences which arise out of one continuous criminal act or single transaction (Nadin-Davis, 1982; 396). Three specific examples respecting the use of concurrent sentences are given below (Nadin-Davis, 1982; 402-406):

- a) Where an accused is convicted both of conspiracy to commit an offence and the substantive offence, concurrent sentences should be given.
- b) Where goods from one theft are found in the accused's possession at different times, only one transaction is really involved and concurrent sentences should be imposed.
- c) While a sentence consecutive to a life term cannot be imposed because it is an absurdity, there is no prohibition against imposing several concurrent life sentences or other sentences concurrent to life.

3.3.2 Consecutive Sentences

The use of consecutive sentences has been justified on the basis of a number of sentencing principles. One such principle is deterrence; that is, consecutive sentences should be used to discourage criminal activity in certain circumstances, e.g., for an offender who commits an offence while on bail. Consecutive sentences have also been justified on the basis of their denunciatory effect and their contribution to the overall protection of the public.

As a general rule, consecutive sentences are imposed for multiple offences which arise out of separate criminal transactions (Nadin-Davis, 1982; 396). Using the Commission's definition of "multiple offences", they thus would be imposed for "string of offence" situations. A number of common examples can be found regarding the use of consecutive sentences (Nadin-Davis, 1982; 401-405):

- a) Offences committed during or to facilitate flight from the commission of an earlier offence require consecutive sentences (the policy of the law here is to discourage further offences while an offender is in the process of flight, particularly such acts as shooting or attacking police officers).
- b) Section 83 of the *Criminal Code* imposes a mandatory consecutive term of one to 14 years for a first offence and 3 to 14 years for subsequent offences, for using a firearm while committing, attempting to commit or fleeing from the commission or attempted commission of an indictable offence (the section illustrates a policy of imposing double liability on persons for one criminal act, presumably to discourage the use of firearms in the commission of other offences).
- c) Section 137(1) of the *Code* provides that sentences for escape from custody shall be served concurrently with time being served or, if the court so orders, consecutively. Consecutive sentences are usually imposed (the policy of the law being specific and general deterrence respecting the commission of these offences).
- d) Where an offence is committed while the accused is on bail in respect of another unrelated offence, despite the order of convictions, consecutive sentences should be imposed (the policy of the law is to discourage the commission of offences pending trial).

3.3.3 The Totality Principle

The principle of totality may be described as follows: whenever an offender is convicted and sentenced for more than one offence, at either the same or subsequent sittings, the sentences imposed must not be disproportionate, in their cumulative effect, to the overall culpability of the offender (Nadin-Davis, 1982; 399). This description of the totality principle focuses on proportionality between the offences and the total sentence. Another rationale for the totality principle relates to the principle of rehabilitation whereby the total sentence should not be crushing, given the offender's record and prospects for reform (Thomas, 1979; 57).

The application of the totality principle is not limited to sentences imposed at the same time, but applies to all situations in which an offender may be subject to more than one sentence (Ruby, 1980; 34). Since the totality principle is a matter of policy, there are no definitive rules to guide the courts in its application. Each case will be decided on its own particular facts to determine whether the totality of the sentences reflects punishment which is *excessive* given the offender and the circumstances of the offence.¹⁴

3.3.4 Two Additional Problems: Disparate Tests and Application of the Totality Principle

The evolution of different tests by different Courts of Appeal for the imposition of concurrent and consecutive sentences is evident from an

examination of appellate jurisprudence on this issue. To determine whether sentences for multiple offences should be consecutive or concurrent, the Nova Scotia Court of Appeal has used the test of a "continuous criminal act".¹⁵ The Court has decided that it is a question of fact whether the criminal acts show a concurrency of intent, time and place (in which case concurrent sentences are to be imposed). The Ontario Court of Appeal has devised a different test for determining whether to impose consecutive or concurrent sentences. It has used a "break in the transaction" test. For example, the Court imposed a consecutive sentence for two offences of rape against the same victim where there was a lapse of a few hours between the offences.¹⁶ The use of different tests to determine the same question potentially results in different conclusions in comparable cases and undermines the goals of equity and uniformity of approach in sentencing. The current situation has been summarized as follows:

It often seems that the appeal Courts regard the rules of consecutive and concurrent sentencing as containing a great deal of discretion for the sentencing judge, and take the view that *it does not really matter how sentences are calculated, so long as the final result is just and appropriate* (Nadin-Davis, 1982; 398).

The Newfoundland Court of Appeal acknowledged this ambiguity in the law in the following terms:

I do not subscribe to the submission of counsel for the appellant that it is important in this appeal to enunciate a principle which would clearly state when sentences should run consecutively or concurrently. Indeed, I doubt whether it is possible to lay down any hard and fast rule.¹⁷

Nadin-Davis notes that "modification of sentence to accord with the totality principle is a commonplace occurrence in both trial and appellate Courts" (1982; 399). There are basically two ways in which the totality principle is applied to modify the overall sentence length, neither of which promote clarity and consistency in sentencing. The first approach is to impose consecutive sentences of reduced lengths to avoid a disproportionate total sentence.¹⁸ This approach illustrates an apparent tension between the totality principle and the sentencing principle of proportionality. While it is acknowledged that the principle of totality modifies proportionality, the reduction of sentence lengths for individual sentences may lead to distortion in the offender's criminal record for subsequent sentencing purposes.

There is a second way in which the principle of totality operates to change (some would say distort) the usual application of the rules governing the imposition of consecutive and concurrent sentences. As illustrated in one case involving a series of unrelated weapons and substantive offences, the Nova Scotia Court of Appeal imposed consecutive sentences for each of the weapons offences and imposed concurrent sentences for each of the other substantive offences even though the latter were unrelated and thus would normally attract consecutive sentences.¹⁹ Another court, in the same fact situation, applied the totality principle in a completely different way. The court held that the weapons offences must be served consecutively to their underlying offences but could be served concurrently with both each other and with the other offences.²⁰

3.4 A Proposed Solution

The Commission considered a number of proposals in formulating a solution to some of the problems noted previously. Some briefs submitted to the Commission suggested that consecutive sentences should be subject to an upper legislative limit (The Law Reform Commission of Canada and the John Howard Society of Alberta). Another brief recommended the formulation of principles to govern the imposition of consecutive and concurrent sentences (The Canadian Crime Victims Advocates). The Commission studied variations on these proposals in some detail and ultimately rejected the retention of concurrent and consecutive sentences for multiple offence sentencing.

The Commission has adopted a concept which is new to the North American criminal context but has been used for a number of years in Sweden, the Netherlands, West Germany and Austria. The concept is the global sentence, or what the Commission proposes should be called the “total” sentence. As noted in the earlier discussion respecting complexities which arise in the application of the totality principle, it seems that the courts are more concerned with the final sentence for multiple offences than with the specific means of arriving at that result. The Commission’s research confirms this finding and has prompted it to conclude that both the means to achieve a sentence for multiple offences and the final result should promote clarity and consistency in multiple offence sentencing. The Commission was not hopeful that this could be achieved by the use of principles or a numerical capping mechanism in the current context of consecutive and concurrent sentences and is therefore recommending an entirely new mechanism.

9.5 The Commission recommends that the use of consecutive and concurrent sentences for multiple offence sentencing be replaced by the use of the total sentence.

The total sentence would be available for offences for which convictions were registered on the same or different days so long as they were the subject of the same sentencing hearing.

3.4.1 The Total Sentence

The Commission proposes that the total sentence should be determined and imposed in accordance with the following procedure:

The sentencing judge would apply the Commission’s statement of the purpose and principles of sentencing to determine and assign an appropriate sentence for each offence as if he or she were considering that offence in isolation from all other offences. The requirement to assign a sentence to each offence serves two purposes: there is a clear indication on the criminal record of the sentence for each offence; and an offender who contests the sentence indicated for a particular offence is able to appeal it.

The next step would be for the sentencing court to apply the principle of totality to arrive at and impose a total sentence. A distinction would thus be made between the ascription of a sentence for each offence and the imposition of the total sentence. The main effect of the application of the totality principle would be to reduce, where necessary, the total length of the sentence imposed to ensure that the total sentence was proportionate to the offender's overall culpability.

The maximum period of incarceration which could be imposed as a total sentence would be circumscribed by the following formula. The available maximum penalty for the total sentence would be the lesser of: the sum of the maxima provided for each offence or the maximum provided for the most serious offence enhanced by one-third. For example, if offence A carried a maximum penalty of 12 years and offence B was punishable by a maximum of 1 year, the potential length of the total sentence for offences A and B would be the lesser of $(12 + 1)$ or $(12 + 4)$. In imposing a total sentence for offences A and B, the court could thus sentence the offender to a maximum term of 13 years. This formula has been adopted for two reasons: to ensure that the offender is not subject to a sentence which exceeds the combined maxima for the individual offences; and to prevent the disproportionate inflation of the total range available by combining a minor offence with a serious one. The Commission is hopeful that use of the total sentence will reduce tendencies to lay multiple charges in inappropriate circumstances.

Offenders sentenced to a total sentence would be eligible for remission-based release.

A total sentence for multiple offences could not be imposed in addition to an enhanced sentence for one offence. The total sentence and the enhanced sentence would be alternative dispositions.

If the above-noted procedure were adopted, the form of warrants of committal would have to be amended to reflect the use of total sentences.

3.5 The Retention of Concurrent and Consecutive Sentences

By proposing the total sentence, the Commission has dealt with multiple offence sentences currently embraced by paragraph 645(4)(c)(ii) of the *Criminal Code*. The Commission proposes the retention of the consecutive and concurrent sentences for a number of limited situations. They are limited either because they are not frequently imposed or because their current use is expected to decline if the Commission's recommended fine default scheme is adopted (discussed in Chapter 12). That scheme would be more restrictive respecting the power to impose a term of imprisonment for fine default and would abolish the "quasi-automatic" imposition of imprisonment for fine default at the time that the fine is ordered.

3.5.1 Concurrent and Consecutive Terms For Default

Subsection 645(4)(b) deals with a sentence where both a fine and a term of imprisonment are imposed for one offence. It thus does not deal with multiple offences *per se*. The subsection permits a term imposed for fine default to be served consecutively to the original custodial term. Paragraphs 645(4)(c)(i) and (iii) deal with multiple offence situations and empower the court to make terms imposed for fine default either consecutive to one another or to other custodial dispositions. The Commission suggests that these provisions should be removed from subsection 645(4) and should be subject to a general power to permit a term of imprisonment imposed for fine default to be served consecutively to any other term of imprisonment that is being served or is to be served by the offender. A provision of this nature was included in subsection 668.17(10) of the proposed Criminal Law Reform Act, 1984 (Bill C-19):²¹

668.17(10) Any term of imprisonment imposed under this section shall be served consecutively to any other term of imprisonment that is being or is to be served by the offender unless the court orders otherwise.

Therefore,

9.6 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.17(10) of the Criminal Law Reform Act, 1984 (Bill C-19).

The Commission is also satisfied that this provision in the context of total sentences would address the current legal complexities which arise respecting the imposition of a consecutive sentence for an offence committed while an offender is subject to a term of probation as part of a suspended sentence. Subsection 664(4)(d) of the *Criminal Code* governs this situation and permits the court which made the probation order to revoke the order and impose “any sentence that could have been imposed if the passing of sentence had not been suspended”. The issue is whether the sentence imposed for the breach of probation can be made to run consecutively to the sentence which is substituted for the suspended sentence. The controversy revolves around the degree to which subsection 664(4)(d) modifies the application of the rules in subsections 645(4)(a) and 645(4)(c).²²

3.5.2 Concurrent/Consecutive Terms Imposed on an Offender Who is Subject to Another Sentence

Paragraph 645(4)(a) applies to an offender who commits an offence while under sentence for a previous offence. The court may order that the sentence for the second offence be served consecutively to that given for the first offence.

The Commission is satisfied that a general provision for the imposition of consecutive or concurrent sentences similar to that proposed in section

668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19) would embrace those situations currently covered by subsection 645(a) of the *Criminal Code*. The proposed section 668.24(a) provided as follows:

668.24 Subject to subsection 668.17(10) or any other provision of this or any other Act of Parliament, where a court imposes a term of imprisonment on an offender,

- (a) in respect of an offender who is serving a term of imprisonment imposed for another offence, or...
the court may direct that the terms of imprisonment shall be served concurrently or consecutively.

9.7 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19).

The specific wording in subsection 668.24(a) could be modified to empower the court to make the total sentence consecutive to an earlier imposed total sentence.

The Commission anticipates that a general provision to impose a consecutive sentence in conjunction with a power to make prison terms imposed for default consecutive to other prison terms, would cover all situations currently addressed in subsection 645(4). Thus, the court would retain the power to impose consecutive sentences in the following situations and could order:

- a) That a term of imprisonment imposed for an offence for which the offender was convicted while under sentence for another offence be served consecutively to that first sentence.
- b) That terms of imprisonment imposed for wilful default of community sanctions be served consecutively to any other term of imprisonment that is being or is to be served by the offender, unless otherwise ordered by the court.

The total sentence specifically would be used for sentencing multiple offences currently covered by subsection 645(4)(c)(ii).

4. List of Recommendations

9.1 For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:

- 12 years
- 9 years
- 6 years
- 3 years
- 1 year
- 6 months

- 9.2 The Commission recommends that hybrid offences be abolished and reclassified as offences carrying a single maximum penalty of 6 months, 1 year, 3 years, 6 years, 9 years or 12 years imprisonment.
- 9.3 The Commission recommends that the dangerous offender provisions in the *Criminal Code* be repealed.
- 9.4 The Commission recommends that, according to explicit criteria, the court be given the power to impose an exceptional sentence exceeding the maximum sentence for specified offences by up to 50 %, following the procedure specified in this report.
- 9.5 The Commission recommends that the use of consecutive and concurrent sentences for multiple offence sentencing be replaced by the use of the total sentence.
- 9.6 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.17(10) of the Criminal Law Reform Act, 1984 (Bill C-19).
- 9.7 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19).

Endnotes

- ¹ This relationship between maximum penalties and actual sentences is not new. Stephen observed in 1883 that "the mere lowering of maximum punishments would, no doubt, prevent the infliction of exceptionally severe punishments in exceptionally bad offences; but in practice, it would make very little difference, for the maximum punishment authorised by law for any given offence is in practice very rarely inflicted" (cited by Thomas, 1979, p. 62).
- ² The Canadian Sentencing Commission data on current sentencing practice reflect the two most recent attempts to obtain systematic national sentencing statistics. One was drawn from the FPS-CPIC data base and was made available by the Canadian Centre for Justice Statistics. The second was a study of sentenced admissions to provincial and federal institutions conducted for the Canadian Sentencing Commission and the federal Department of Justice (Hann and Kopelman, 1986). The sentencing trends emerging from both were similar.
- ³ The median is usually close to the mean (or average) with which most people are more familiar. We have chosen to present the median because the mean is easily affected by a few extreme scores and can accordingly present a distorted view of the distribution of sentences. This is not the case with the median.
- ⁴ The reader should bear in mind that those percentiles refer only to those offenders who receive sentences of custody. The 90th percentile therefore includes 90% of cases resulting in custody, which are naturally the more serious ones. For many of these offences, a substantial proportion of offenders receive non-custodial sentences. The 90th percentiles presented in Table 9.1 therefore include 90% of the most serious cases, and a much higher percentage of all offenders convicted of any particular offence.
- ⁵ In reality, of course, judges treat the two offences very differently. The median sentence for manslaughter during this period is five years (98% of cases were imprisoned); the median sentence for break and enter is six months (65% were imprisoned).
- ⁶ Similar results emerge from research which asked members of the public to rank-order a series of offences on a scale of seriousness. One study (Rossi, Waite, Bose and Berk, 1974) found that break and enter received a rank approximately midway between the most and the least serious offences.
- ⁷ First and second degree murder and high treason are exceptions. For these offences, the maximum penalty of life imprisonment is mandatory and the *Criminal Code* sets out a minimum period of time that the offender must serve in custody before release. For first degree murder, that minimum period is 25 years. These offences were excluded from the general review of maximum penalties. Discussion of these offences will be postponed until Chapter 10.
- ⁸ The average number of different offences was five. The average number of sentences per offender was six, and the average number of counts per inmate was 12.
- ⁹ This outcome of consensus in rankings derived from criminal justice professionals and members of the public is consistent with a great deal of previous work upon the topic of seriousness ranking of offences. (See for example, Levi and Jones (1985); McLeary, O'Neil, Epperlein, Jones and Gray (1981).)
- ¹⁰ Over a century ago (1843) the Criminal Law Commissioners in England recognized as much when they noted "There is no real or ascertainable connexion (*sic*) or relation existing between crimes and punishments which can afford any correct test for fixing the nature of the extent of the latter, either as regards particular offences or their relative magnitudes" (cited by Thomas, 1978, p. 24).
- ¹¹ See Ericson, (1981, 1982) and Ericson & Baranek (1982).
- ¹² See *Re Abbott* (1970), 13 C.R.N.S. 70 (Ont. S.C.); *MacIntyre v. The Queen* (1982), 2 F.C. 310 (F.C.A. A.).
- ¹³ *R. v. Paul* (1982), 67 C.C.C. (2d) 97 (S.C.C.).

- ^{14.} See, for example, *R v. Fait* (1982), 68 C.C.C. (2d) 367 (Alta. C.A.).
- ^{15.} *R. v. Brush* (1975), 13 N.S.R. (2d) 669 (C.A.), at pp. 670-671.
- ^{16.} *R. v. White, Dubeau and McCullough* (1974), 27 C.R.N.S. 66 (Ont. C.A.).
- ^{17.} *Gollop v. R.* (1980), 22 C.R. (3d) 292 (Nfld. C.A.) at p. 297, *per* Chief Justice Mifflin. See also *R. v. Cousins* (1981), 22 C.R. (3d) 298 (Nfld. C.A.).
- ^{18.} *R. v. Newman* (1977), 22 N.S.R. (2d) 488 (N.S.C.A.).
- ^{19.} *R. v. MacLean* (1979), 49 C.C.C. (2d) 552 (N.S.C.A.).
- ^{20.} *R. v. Jensen et al.*, [1983] 1 W.W.R. 717 (Alta. C.A.).
- ^{21.} The Bill received first reading on February 7, 1984 and subsequently died on the order paper.
- ^{22.} Subsection 664(4)(d) provides that where an offender commits an offence while on probation as part of a suspended sentence, the court that made the order may revoke it and impose any sentence that could have been imposed if the passing of sentence had not been suspended. The courts have taken different positions on whether the relevant time period in subsection 664(4)(d) is the date of conviction for the offence for which sentence was suspended or the date of imposition of the substitute sentence. This, in turn, has determined whether the courts have considered the offender to have been "under sentence" and thus subject to the imposition of consecutive sentences pursuant to subsection 645(4)(a). The jurisprudence has also taken different positions respecting whether the above fact situation constitutes proceedings "before the same court at the same sittings" as required in subsection 645(4)(c). The Supreme Court of Canada in the case of *Paul v. The Queen* (1982), 67 C.C.C. (2d) 97, settled some of the rules respecting the power to impose consecutive sentences pursuant to subsections 645(4)(a) and (c). The court held (at p. 129):
 - a) a judge may order that a sentence be served consecutively to another sentence he has previously or is at the same time imposing (s.645(4)(c)).
 - b) the judge cannot order that a sentence be made consecutive to that imposed by another judge in another case unless that sentence had already been imposed by the other judge at the time of the conviction in the case in which he is sentencing (645(4)(a)).

However, the *Paul* case did not deal with the above-noted fact situation respecting suspended sentences. Mr. Justice Lamer cited the appellant's argument that application of the rules in subsection 645(4) were modified by subsection 664(4)(d). However his Lordship offered no *dicta* on the issue.

Chapter 10

The Meaning of a Sentence of Imprisonment

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Chapter 10

The Meaning of a Sentence of Imprisonment

Apart from death, imprisonment is the most drastic sentence imposed by law. It is the most costly, whether measured from the economic, social or psychological point of view. (Law Reform Commission of Canada, 1976: Part II, p. 10)

1. Imprisonment in Canada

On any given day there are approximately 30,000 people incarcerated in this country (Correctional Service of Canada, 1986). With an imprisonment rate of 108 per 100,000 inhabitants, Canada has one of the highest rates among Western nations (Correctional Service of Canada, 1986).¹ Besides the incalculable human costs to a person removed from society, there are easily calculable economic costs. Incarceration costs between 10 and 15 times as much as do alternative sanctions (Nielsen Task Force Report on the Justice System, 1986). The average annual cost of keeping a prisoner in a maximum security penitentiary is \$50,000. In medium or minimum security institutions the cost is \$35,000. The cost per bed of building a new institution is now \$200,000. One does not have to look far, then, for reasons to support the exercise of restraint in the use of incarceration. As the recent Nielsen Task Force Report on the Justice System (1986) noted: "Our over-reliance on incarceration is a luxury which is quickly becoming difficult to afford" (p. 288).

This chapter will address issues related to sentences of imprisonment. As well, it contains the recommendations of the Commission regarding this, the most invasive penalty imposed by the criminal justice system. Imprisonment is but one sanction however, and before evaluating the impact of the Commission's proposals, it is necessary to read the next chapters which deal with guidelines and community sanctions.

1.1 The Administration of Sentences of Imprisonment

At the present time, three different authorities make largely independent decisions regarding the length of time a person sentenced to a term of

imprisonment must spend in custody. When the judge pronounces the sentence, he or she sets the limit of time that the offender may be held in custody for the offence. Correctional authorities are responsible for calculating the remission credits that most prisoners may earn for good behaviour, which entitles them, where maximum credits are earned, to be released after serving two-thirds of the sentence pronounced by the judge. The parole board has the authority to release most prisoners on full parole after they have served one-third of their sentence.

An example will illustrate how the system works. At trial, a man convicted of armed robbery receives a term of six years. If he is granted full parole at earliest eligibility, he will be released from custody after two years. If he is successively denied full parole but earns all his remission credits, he may be out after four years. Whether the judge takes into consideration either of these possibilities in setting the length of the sentence is unclear. In determining whether to release the inmate after two years the parole board is rarely aware of the reasons given by the judge in setting the term of imprisonment at six years; the decision to release is made according to different criteria. If he was thought to be a poor risk and denied release by the board, correctional authorities may release him at four years if he has earned his credits through good behaviour. He will then likely spend the remaining two years in the community, provided he complies with the conditions of the mandatory supervision program.

What then, is the exact meaning of a six year sentence? Clearly it may have a different connotation for the judge who imposes the sentence, correctional authorities who administer the sentence and the parole authorities who decide whether to grant or withhold release. As well there are other parties to consider. Crime victims may understand a six year sentence to mean six years in prison. No wonder their dismay at seeing the convicted robber on the street after only two. The public, reading that he committed another offence after serving four years in custody must wonder why the prison administration released him on mandatory supervision in the first place. To the convicted offender it may mean six years in custody, if he or she fails to earn any remission or is denied remission-based release.

What happens after the judge pronounces the sentence of imprisonment can be as important as the initial determination of whether to impose a custodial term and if so, for how long. The system is complex. The purpose of the sentence has a different meaning for the judge, the parole board and the correctional authorities. The offender cannot predict with any accuracy how long he will be detained in custody. The public cannot help but be confused by a process which says it is doing one thing but is seen to be doing another.

The confusion surrounding early release was summarized by the Government of Canada in *The Criminal Law in Canadian Society* (1982; 34): "The manner in which such processes as parole, remission, temporary absence and mandatory supervision affect sentence is not well understood by the public, and is periodically subject to criticism in the media and by criminal justice professionals who claim either that these processes operate too leniently, or

that they should not be in use at all, because they needlessly expose the public to harm, usurp the court's sentencing authority and unduly lessen the effectiveness of the sentence."

This then is the first major objection to current laws and practices which affect the meaning of sentences of imprisonment: they introduce a great deal of ambiguity which in turn results in confusion and unpredictability in the sentencing process. All major participants and interested parties in the transaction of a sentence – the judge, the offender, the public, the victims, correctional authorities, and the Parole Board – may have different understandings of the meaning of the sentence of imprisonment imposed by the court.

1.2 Jurisdiction Over Sentences of Imprisonment

Federal and provincial governments share jurisdiction over offenders sentenced to terms of imprisonment for offences under all three federal statutes considered by this Commission (*Criminal Code*, *Narcotic Control Act*, *Food and Drugs Act*, Parts III, IV). Sentences of imprisonment of less than two years are served in provincial prisons and reformatories while terms of two years or more are served in federal penitentiaries.

Statistics cited by the Correctional Law Review (1986) reveal that there are a great number of people in Canada currently serving sentences of imprisonment in both the federal and provincial systems:

There are approximately 12,000 inmates in 60 federal institutions across the country, run by 10,000 staff. There are a further 7,000 federal offenders on some form of conditional release. There are approximately 20,000 inmates in provincial institutions across the country, with approximately 20% in custody on remand (p. 4).

While the Commission recognizes that laws and practices regarding the administration of a sentence of imprisonment differ in the provincial and federal systems, these differences are not addressed in any detail in this report. They are beyond the scope of the Commission's mandate, and within the purview of the mandate of the on-going Correctional Law Review (Ministry of the Solicitor General).² There is a pressing need, however, to coordinate the ways in which the sentence imposed by the judge is carried out at both the provincial and federal levels of government. In constructing these proposals, the Commission sought to construct a framework for the administration of carceral sentences to apply to *all* sentences of imprisonment. Hence, although it is beyond the scope of this report to detail the changes required to rationalize the laws and practices regarding sentences of imprisonment at both levels of government, the Commission is of the view that such a rationalization is a necessary first step towards an integrated and uniform approach to sentencing in Canada.

There can be no justification for differences in the meaning of a sentence of imprisonment at the federal and provincial levels. Equity and justice can

only prevail if there is a uniformity of approach to the administration of a sentence in both systems.

1.3 Terms of Reference

In the terms of reference, the Commission is directed to examine various possible approaches to sentencing guidelines, and in so doing

(d) to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:

iii) the parole and remission provisions of the Parole Act and the Penitentiary Act, respectively, or regulations made thereunder, as may be amended from time to time.

Following a brief overview of the complexities of and concerns surrounding current laws and practices, our recommendations regarding the administration of a sentence of imprisonment will be presented in the following order:

- i. Early Release
 - a) Full-parole release
 - b) Remission-based release
 - c) Conditions upon release
 - d) Withholding Remission Release
 - e) Day Release
 - f) Special Leave
 - g) Clemency
- ii. Open Custody
- iii. Sentences for First and Second Degree Murder and High Treason

1.4 Summary of Proposals

The real meaning of a sentence of imprisonment lies in the human, social and economic costs incurred. It is those costs to the individual and society and the need for restraint that guided the Commission's decision-making with respect to early release, open custody, and sentences for murder and high treason. This chapter, however, will focus on the meaning of a sentence of imprisonment in structural terms: how the sentence imposed by the judge is carried out.

The Commission has interpreted the terms of reference as requiring a review of sentences of imprisonment only to the extent that the application of our proposed sentencing policy requires. There are many other aspects of early release, for example, that are beyond the scope of the Commission's mandate but it was felt that they are better dealt with in the context of the Correctional Law Review.

Although we have considered all issues relevant to the meaning of a sentence of imprisonment as it may be understood in the context of our proposed sentencing policy, there remain issues which could not be addressed exhaustively. Again, the focus of this Commission was on constructing a framework for decisions made about the administration of the sentence that reflects its recommended sentencing policy.

The principle of proportionality should guide the judge in the determination of a fit sentence; it should also guide the decisions regarding the administration of a sentence. This implies that the process of administering a sentence of imprisonment should be governed by law to a greater degree than is now the case. Another factor that guided the Commission's approach to the meaning of sentences of imprisonment was its desire to enhance the role of the court in determining how the sentence is to be carried out.

The recommendations regarding sentences of imprisonment may be summarized as follows:

- **that full parole release be abolished**
- **that remission-based release be retained at a new rate of one-quarter of the sentence**
- **that mandatory supervision be abolished and release on conditions be reserved for those offenders who require special conditions**
- **that release on remission may be withheld in certain exceptional cases according to well-defined criteria**
- **that a system of day release be retained**
- **that a system of special leave be retained**
- **that a system of executive clemency be retained**
- **that the judge assume a greater role in determining the meaning of custody**
- **that release ineligibility periods for murder and high treason be reduced**

At the present time in Canada, sentences of imprisonment are both unclear and unpredictable. The absence of clarity and predictability can only have deleterious effects upon the administration of justice and perceptions of sentencing by offenders, the public and criminal justice professionals. One of the aims of the Commission's proposals is to eliminate the confusion surrounding terms of imprisonment and to enhance equity, clarity and predictability in the process.

2. Early Release

2.1 Full Parole Release

Uniformity of approach and consistency in the application of the law requires that the different components of the criminal justice system share an

understanding of the meaning of a sentence of imprisonment. Similarly, equity, clarity and predictability require a consistency in purpose from the imposition of the sentence through its administration until warrant expiry. Discretionary release on full parole has attracted more criticism than any other aspect of sentencing (e.g., Mandel, 1975).

2.1.1 History

Some form of early release has been in existence in Canada since Confederation. In 1868 inmates were granted early release through earning remission credits for co-operative behaviour and for industrious work habits in prison (*Penitentiary Act*). In 1899, another form of early release was created to allow the Crown to exercise mercy in certain cases, usually on humanitarian grounds (*Ticket-of-Leave Act*).

It was not until 1956 that the Fauteux Commission (created to review the granting of tickets of leave) came to the conclusion that this system, based on clemency, had very little to do with reform or rehabilitation. It recommended that instead, a new system of early release on parole should be offered to all inmates as "...a logical step in the reformation and rehabilitation of a person". Following these recommendations, in 1959 the Government enacted the *Parole Act* to replace the *Ticket-of-Leave Act*, and created the National Parole Board.

The decision to grant full conditional release is currently made by the National Parole Board³ for all federal and provincial prisoners except in three provinces where provincial parole boards exist (British Columbia, Ontario and Quebec). As described in the *National Parole Board Handbook* (1983), parole is the authority granted by the National Parole Board to an inmate to be at large during his term of imprisonment. The term "parole" embraces both full parole, which does not require that an inmate return to an institution unless it is suspended or revoked, and day parole which requires the inmate to return to an institution periodically or after a specified period of time (p. 19).⁴ Most inmates are eligible for full parole after serving one-third of their sentence or seven years, whichever is the lesser (*Parole Regulations*, s.5). Where life imprisonment is imposed other than as a minimum punishment, an inmate is eligible for full parole release after serving seven years, minus any time in custody after arrest and prior to sentencing (*Parole Regulations*, paragraph s.6(a)). There are other special eligibility periods prescribed for indeterminate sentences, mandatory sentences of life imprisonment and for "violent conduct offences".⁵

2.1.2 Rehabilitation: A Problematic Foundation

The purpose underlying the newly-created system of discretionary parole release was based on a rehabilitation-oriented model of justice. It is within this framework that the release criteria to guide the parole board in the exercise of its discretion were formulated. According to section 10 of the *Parole Act*:

10.(1) The Board may

(a) grant parole to an inmate, subject to any terms or conditions it considers desirable, if the Board considers that:

- i) in the case of a grant of parole other than day parole, the inmate has derived the maximum benefit from imprisonment
- ii) the reform and rehabilitation of the inmate will be aided by the grant of parole, and
- iii) the release of the inmate on parole would not constitute an undue risk to society.

Although parole was based on a model of rehabilitation, this model has never been implemented in Canada. According to this model, prison serves as a kind of maximum-security hospital and parole provides the necessary period for convalescence. Since treatment and recovery periods are difficult to quantify in advance, a true rehabilitation model can only be realized in the context of a system of indeterminate sentencing. Canada never adopted a system of indeterminate sentencing and hence, in adopting parole, only adopted part of the rehabilitation model. In the U.S., however, indeterminate sentencing and discretionary parole release together formed the package required for a real attempt at a rehabilitative model. It is disenchantment with this rehabilitation model that has led a number of U.S. states, over the past 15 years, to abolish discretionary parole release as well as to create sentencing commissions to move toward a system of determinate sentencing. Some states that have abolished discretionary parole release have retained a parole board to release and supervise those inmates serving life sentences. In addition, parole boards have been retained to fulfill the discretionary release function for those inmates sentenced prior to the abolition of parole. Given the adoption of the Commission's recommendations, similar provisions must be made for Canada's Parole Board. So far 11 states have abolished discretionary parole release: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico and North Carolina. The problems created by adopting only one element of the rehabilitation model are illustrated in the above criteria for parole release. Under our current system of determinate sentencing, it is difficult to understand how one would determine whether an offender has derived "maximum benefit from imprisonment". We have seen in the historical chapter that one of the most frequently recurring themes in official reports on incarceration was that imprisonment had a debilitating rather than a rehabilitative effect on prisoners. Hence, some would argue it is hard to imagine any benefits accruing to someone who spends a number of years in a penitentiary. In addition, since it is impossible to predict accurately who will re-offend (or when, or why), the issues of risk to society and reform of the inmate are tenuous grounds upon which to release, suspend or revoke inmates on full parole.

2.1.3 Effects of Parole on the Meaning of the Sentence

a) Time Served in Custody:

Terms of imprisonment in this country are substantially affected by parole release. While the relative merits of parole remain controversial, some

characteristics and consequences of the system are clear enough. First, approximately one-third of eligible prisoners are granted release on full parole at some point in their sentences. The majority of all prisoners who are released on full parole were granted full parole upon their first application. Paroled prisoners serve an average of 40% of their sentence inside prison before obtaining release. Over three-quarters of those released on full parole serve less than half of their sentences in prison. (These statistics are all drawn from the 1981 Solicitor General's Study of Conditional Release). Tables (data from 1977 to 1981) provided by the Statistical Liaison Office of the National Parole Board corroborate the view that parole intervention in time actually served in prison is substantial. The following trends emerge:

- 95% of offenders convicted of offences against the person (excluding murder, attempted murder and manslaughter) who received sentences of over 10 years serve less than 10 years in prison;
- 70% of offenders convicted of attempted murder, second-degree murder and manslaughter who received sentences of over ten years served less than ten years in prison. This figure would actually be higher if it did not also encompass cases of second degree murder. Those convicted of second degree murder serve a mandatory period of at least 10 years before becoming eligible for parole. Hence, they automatically increase the percentage of offenders who serve ten years or more in prison.
- 98% of offenders convicted of drug offences and who received sentences of over 10 years served less than 10 years in prison.

These statistics make it clear that there is a substantial difference between the sentence a judge hands down and the length of time an offender actually serves in prison. Moreover, there is a great deal of variation in the parole release rates across different parts of the country. In 1978, for example, there was a 26% difference between the regions demonstrating the highest and lowest rates of parole (Solicitor General of Canada, 1986).⁶ These variations – as well as the indeterminate nature of parole – may lead offenders and public alike to perceive parole as inequitable.

b) Sentence Equalization:

Another consequence of parole is that known as “sentence equalization”: offenders serving longer sentences are more likely to get released on parole than are offenders sentenced to shorter terms. This leads to the result – paradoxical to some quarters such as the public – that the more serious offences (e.g., manslaughter and attempted murder) have higher parole release rates than less serious offences such as theft and fraud. This pattern is noted in a recent report (Hann and Harman, 1986) for the Ministry of the Solicitor General. These authors found that for the period of 1975/76 through 1981/82 parole release rates for manslaughter were between 51% and 64%. These percentages are approximately ten percentage points in excess of a less serious offence (robbery) and 20 to 30 percentage points above the release rates for break and enter (see figure 2.12, pp. 27-29).

To summarize, it is clear that offenders convicted of more serious offences (such as manslaughter) serve a significantly smaller proportion of their sentences in custody than offenders convicted of much less serious crimes (such as fraud). As well, an offender convicted of a serious armed robbery may serve the same time in custody as a purse-snatcher. One consequence of this, as Mandel (1975) has pointed out, is to scramble the rankings of seriousness derived from the existing maximum penalty structure. Proportionality is lost in the shuffle from the sentence handed down by the judge to the early release of the offender on parole.

Another manifestation of the equalization effect can be seen in statistics of time served by parolees versus mandatory supervision releases. Thus, while inmates eventually released on parole were assigned, on average, much longer sentences than inmates released on mandatory supervision, the two groups ended up spending approximately the same amount of time in prison. This was noted by the Solicitor General's Study of Conditional Release (1981), and is also apparent from more recent data provided by the National Parole Board (1984).

The following statistics for manslaughter and robbery cases for the period 1982-83 illustrate the point. If one compares average sentence lengths of parole releases to mandatory supervision releases the difference is striking: those convicted of manslaughter and later released on parole were sentenced on average to 84 months. Those convicted of manslaughter and released on mandatory supervision were sentenced, on average, to 57 months. However, in terms of time served in prison the two groups are quite similar: 38 months for parolees, 41 months for those released on mandatory supervision (see National Parole Board (1984), Table 3).

The 1981 study of Conditional Release concluded: "Both sentence mitigation and sentence equalization, then, clearly appear to be effects of parole, despite the very firm National Parole Board position that they are not objectives" (p. 39). This effect seems undesirable for two reasons. First, because it violates the principle of proportionality, offering in effect a greater discount in time served to those convicted of more serious offences. This militates against equity and justice. Second, because it illustrates how the current system requires parole authorities to encroach upon the sentencing authority of the courts. This Commission is of the opinion that sentence equalization is a negative consequence of parole, and, thus, concurs with the position taken by the Goldenberg Committee (1974) in its report on parole in Canada.

2.1.4 Consideration of Parole and Remission by Sentencing Judges⁷

The already murky waters of sentencing are clouded still further by judges considering, at time of sentencing, release on parole and remission. (Remission will be dealt with in greater detail in the next section). This consideration may take many forms. For example, it is possible that at least some judges are aware of the unstated yet clearly manifested policy to release higher

proportions of serious offenders (for reasons of sentence mitigation and equalization) on full parole. If they are, judges may be increasing the lengths of sentences for certain offenders in anticipation of early release on full parole. Whether they follow this particular strategy or not, what evidence is there that judges are affected by the possibility of parole and remission? In the Commission's survey of sentencing judges (Research #6), only 35% of respondents stated that they never took parole into account at sentencing. Hogarth (1971) reported that two-thirds of judges in his sample admitted they sometimes adjusted their sentences in light of the possibility of parole being granted. To quote the *Solicitor General's Study of Conditional Release*: "In more candid moments, some judges will admit in effect to tripling the sentence in order to provide for a fixed period of "denunciatory" imprisonment (prior to full parole eligibility), for a remission period, and for a "parole" or "rehabilitation" period" (p. 111).

The question of whether judges should consider parole and remission has generated an inconsistent response. The case law does not provide for a uniform approach to this question. There appears to be support in some provinces for the position that this is a valid consideration for judges in the determination of the sentence (see Campbell and Cole, 1986; Ruby 1980). Clearly, inconsistent application of a rule concerning the consideration of parole and remission can lead to unwarranted disparities in sentencing. Ruby (1980) sums it up: "Regardless of the merits of the discussion it would certainly be desirable that some measure of uniformity on this issue be attained, as a prisoner serving a lengthy term in Ontario will quite rightfully have a sense of grievance with regard to the consideration given there to his parole possibilities as compared to that of his fellows in other provinces" (p. 327).

2.1.5 Concerns: Lack of Equity, Clarity and Predictability

It is difficult to discuss concerns regarding equity, clarity and predictability as separate issues since by and large, if a process lacks one, it lacks all three. So, for example, problems of equity arise when full parole release is seen to lack clarity and predictability. Concerns with the operation of these principles in the current system of discretionary release have been raised in earlier chapters but some points bear repetition here.

Critics of parole have long argued that the criteria for parole release are too vague and broad to provide any real guidance to the decision-maker. One regrettable consequence is that parole decisions – both regarding release and revocation – are often seen to be arbitrary by inmates.

Previous government reports have alluded to negative reactions to parole on the part of offenders. The Sub-Committee on the Penitentiary System in Canada (1977) noted that "inmates are under the impression that the Parole Board does not, in all circumstances, treat them fairly. The records contain many examples of inmates whose parole has been revoked because they arrived

a few minutes late and who were also charged with being unlawfully at large" (p. 151). This same report also stated the following (in reference to the need for a mechanism other than revocation): "It is, therefore, extremely disconcerting to hear of inmates having their paroles suspended and revoked for essentially trivial reasons" (p. 151).

One of the recommendations (#64) of the 1977 Sub-Committee on the Penitentiary System in Canada acknowledged these perceptions:

The appearance of arbitrariness in parole, especially in parole revocation without notice or reasons, is an unsettling factor in penitentiary life. There is also much resentment of the fact that mandatory supervision places discharges under conditions similar to parole for a period of time equal to that of their earned and statutory remission.

The parole system should be reviewed with a view to lessening these arbitrary aspects.

Similar findings emerged from surveys of offenders conducted by this Commission. In one, (*Ekstedt, 1985*) those who had experience with parole expressed reservations about the fairness of decisions. That the system is perceived to be arbitrary by those most critically affected by it lends a very real support to the concerns repeated in the literature. In addition to the perceived unfairness of a process grounded in wide discretion is the dilemma that some judges do and others do not consider the likelihood of full parole release in setting the length of a term of imprisonment. The practice of the Parole Board of effectively equalizing sentence lengths through parole release is further seen to undermine the sentence of the court.

There is no clear understanding on the part of offenders, criminal justice professionals, judges or the public as to the laws and practices surrounding discretionary parole release. The laws are complex, the practices vary and the result is that there is no shared understanding of what a sentence of imprisonment actually means. It is, in fact, not possible to predict with any accuracy the actual time in custody that most inmates will serve. Due to the wide discretion given to release authorities and the individualized nature of the release criteria, no convicted offender receiving a lengthy term of imprisonment can know how much time he or she faces in custody after hearing the sentence of the court.

Although general support was expressed for some form of early release, a recurring concern in submissions received by the Commission was the accountability of the releasing authority in the exercise of its discretion. Support was expressed for greater clarity in release criteria, guidelines for the releasing authority to ensure uniformity of approach and the need for some body to review early release decisions. Many groups and individuals stressed the need for better communication between judges who impose the sentence and the parole board and correctional authorities who ultimately administer it. The overall picture of a process fragmented by different approaches to sentencing emerged from the submissions.

The concerns expressed above primarily address the problems of discretionary parole release within the context of the existing sentencing

structure. The concerns become even more pronounced when full parole release is considered within the context of the Commission's proposals regarding principles of sentencing and its integrated set of recommendations. Proportionality and discretionary release on full parole are not natural allies. The reason for this is obvious – proportionality can only be drawn between two determinate quantities. The judge imposes a fixed term of imprisonment. This sentence is stated in open court and is subject to review by a higher court. The parole release date, of course, remains undetermined at the time of sentencing. In fact, in some cases the release decision is made on the basis of evidence that may not be revealed to the accused. The decision of the board is therefore not subject to public scrutiny or judicial review.

2.1.6 Recommendations

In order to achieve a uniformity of approach to the determination of sentences the meaning of a sentence of imprisonment must be clear to all involved in the sentencing process: most importantly, the judge who imposes the sentence, the correctional authorities who administer the sentence, and the inmate who must serve the sentence.⁸ It is the view of this Commission that a common understanding of the meaning of a sentence of imprisonment will not be possible as long as a system of full parole release exists.

This chapter has not dealt exhaustively with the many arguments for or against parole. To do so would require a great deal more space than is available here; the literature to be addressed is voluminous. However, after reviewing that literature there did not seem to be any positive benefits of discretionary parole release which could possibly justify its continued existence within the integrated set of reforms advocated by this Commission.⁹

Although at present the eligibility dates are set in law, the parole board is given absolute discretion to fix the time of that release according to broadly-defined criteria. A sentence of life imprisonment for manslaughter can mean a term of custody from seven years to life. It is the view of this Commission that the length of time an offender will spend in custody should be fixed, as much as possible, at the time of sentencing.¹⁰

10.1 The Commission recommends the abolition of full parole, except in the case of sentences of life imprisonment.

The model of sentencing proposed by this Commission is not based on rehabilitation and the need for wide discretion. In the context of the proposed sentencing model, the Commission has decided to recommend the abolition of parole largely for three reasons. First, it conflicts with the principle of proportionality which the Commission has assigned the highest priority in its sentencing rationale. Second, because discretionary release introduces a great deal of uncertainty into the sentencing process. Third, because parole release transfers sentencing decisions from the judge to the parole board. These tendencies may result in unwarranted disparities in time served. Moreover, the

effects of this transfer are frequently quite dramatic, as shown by the data on percentage of sentences actually served in prison.

Under current law and practice it is difficult for judges to estimate how long offenders sentenced to prison will actually spend in custody. Small wonder then, that they sometimes take parole and remission into account when sentencing. Under the proposals of the Canadian Sentencing Commission this would no longer be the case. With the abolition of full parole, the only portion of an offender's sentence that would be served in the community is the one-quarter reduction effected by earned remission. (see section 2.2 below). Also, in order to aid their consideration of the appropriate sentence length, judges would be provided with guideline ranges which would further reduce the uncertainty surrounding sentencing. According to these proposals, sentences imposed in court would more closely reflect "real time" in the sense that an offender serves to a greater degree the sentence imposed by the judge. The necessity for other considerations (such as early release) would consequently diminish. Judges need not, and should not, consider early release when determining the appropriate length of custody.

In recommending the abolition of full parole, the Commission fully recognizes the continuing need for some method of reducing the time served in custody by an inmate, and so has also recommended the retention of a form of earned remission (to be described in the next section). Finally, the Commission recognizes that the objective of releasing inmates prior to the expiry of their sentence to allow for the re-integration into the community must continue to be pursued. Hence, we will recommend the retention of a form of day release in later sections of this chapter.

2.1.7 Impact of Recommendations on Prison Populations

The Commission contracted with experts in the field of sentencing statistics to assess the impact upon prison populations of the abolition of parole (see Appendix A, 3.11). It is hard for these impact studies to be exact, for several variables are undetermined. For example, since it is not known with precision the extent to which judges take parole into account, one cannot know the extent to which they would 'correct' sentences knowing that parole no longer existed. However, it is clear that there would be an increase in the federal prison population if parole were abolished and no changes were made to sentences handed down. The best estimate is that this increase would be in the area of 20%. More important than the exact percentage by which penitentiary populations would rise, is the fact that this increase would take place within a relatively short space of time. In fact, projections indicated that unless sentence lengths were modified, the abolition of parole would result in a substantial increase in the federal prison population within a period of two years. The results of these analyses then, underscore the need for modification of sentence lengths if parole is to be abolished in this country.

2.2 Remission-Based Release

2.2.1 Remission in Canada Today

Currently, "every inmate of a penitentiary may be credited with 15 days of earned remission of his sentence for every month he has applied himself industriously to the program of the institution in which he is confined. Such remission may be forfeited in whole or in part as a result of a conviction in the disciplinary court of the institution"¹¹ (National Parole Board, 1983). There are two elements involved in earning remission: participating in institutional programs (up to ten days a month) and demonstrating good conduct (up to five days a month). Remission cannot be earned by inmates serving life sentences.

It is claimed that if remission and parole were abolished, inmates would have no incentive of any kind to follow institutional rules and the system would have lost any opportunity to affect the course of prisoners lives until the expiry of their warrants of committal. Remission then, in theory at least, is supposed to serve two important functions: it provides prison administrators with a form of control and it provides prisoners with an incentive to reduce their time in custody by up to one-third.

In practice the remission system in its present manifestation falls short on both counts. Before discussing the deficiencies of remission as it now exists, it is worth stepping back a little to ask a basic question: what is the objective of the remission system? When this question was posed to a sample of senior correctional personnel (Badovinac, Harvey, Eastman and Wormith, 1986), the responses were revealing. First of all there was little consensus as to the overall objective of remission. The most frequently-mentioned purpose was "administrative control", but even this accounted for fewer than one-quarter of responses. Other purposes cited included: providing an incentive to inmates (19%); providing an early release mechanism (11%); providing a punishment system (9%); providing a way to instill positive attitudes to work; providing a way to hold inmates accountable for their actions (9%). These multiple purposes reflect the dual nature of earning early release through program participation and the manifestation of good behaviour.

A recent examination of remission (Ross and Barker, 1986) demonstrates that practice and theory have parted company. If remission were an incentive-based scheme, an offender would arrive at an institution with, say, a six year sentence, knowing that his behaviour over the next four years would determine whether he would be able to serve the last two years in the community (under mandatory supervision) rather than prison. Current practice among administrators, and the perception among inmates, is that the latter are notionally awarded full remission credits (two years in our example) upon arrival. Days are subtracted from this total if the inmate violates institutional rules. This procedure changes the perception of remission. As Ross and Barker (1986) note: "What was supposed to be a carrot quickly became a cudgel" (p. 14).

2.2.2 Commission Proposals

As has been noted, the thrust of the Commission's sentencing proposals has been in the direction of real time sentencing. This means, among other reforms, the abolition of discretionary full parole. The reader might well ask the following question: "If more determinate sentencing is the aim, why retain earned remission for any portion of the sentence?" The answer to this question is not simple and implies both practical considerations and questions of principle. Let us first address the issue of principles. Remission is used by prison administrators as an incentive to maintaining discipline within the institutions. The abolition of all remission may then have negative effects on prison discipline. It may be argued that prison administrators can resort to other means to maintain prison discipline, such as the denial of family visits, the frequent transfer of prisoners from one institution to another and solitary confinement. This argument misses the point that, if remission is abolished, harsher measures will have to be systematically used to ensure prison discipline. Not only would this contradict the principle of restraint in the use of punishment, but it may well be that increasing the repressive character of imprisonment will result in anger and despair which are, in turn, conducive to prison riots and hostage-taking. Hence, making prisons a more punitive environment than they already are, may eventually defeat the purpose of ensuring discipline. Incidents such as prison riots and hostage-takings signify a breakdown of all discipline. Furthermore, the Commission is firmly of the view that removing the more humanitarian measures available to inmates would be a retrograde step.

Secondly, the merits of a proposal must also be assessed in terms of the feasibility of the proposal. It must be remembered that there are now at least three channels for early release; namely, full parole, day parole and remission-based release. When all of these are taken into account, prisoners serve, on the whole, slightly less than half of their sentences in custody. It would be inconsistent to abolish full parole and earned remission and keep day parole as a weak safety valve which could not withstand for long the pressures generated by the abolition of all other programs of early release. The abolition of all forms of early release would result in at least doubling the prison population in a short period of time. The impact would be felt within a year in provincial prisons, where convicted offenders serve all terms of imprisonment which are under two years. There would be two ways of avoiding this outcome. One would be to reduce drastically the use and the length of custodial sentences. The other would be to make room for newcomers by granting conditional release to all applicants serving their sentence under the old rules. None of these solutions would work. It is unrealistic to expect that judges would drastically alter their sentencing practices overnight. Furthermore, resort to such radical solutions would be largely publicized and would profoundly shock the public. The second option of vacating prisons to make room for the new prisoners would also result in a mockery of justice and would generate a climate of great hostility among the new prison population. In other words, the total abolition of all forms of remission would be such a drastic step that one

could compare it to shock therapy for the penal system. Given that the benefits of shock therapy are dubious at best for individuals, it is expected that for a system which is as complex and unwieldy as the criminal justice system, shock therapy would in all probability lead to chaos.

In the absence of parole, then, the Commission felt it desirable to retain some method whereby inmates can earn a reduction in time served in custody. There are two components to the Commission's recommendations in this regard. The first concerns the manner in which inmates earn remission. Despite the intention of the *Penitentiary Act* to reward inmates for participating in programs and displaying good behaviour, the reality seems to be that mere passive good behaviour is sufficient. There is, therefore, a contradiction between what the system states it is doing and what it actually does. (This can only serve to contribute to the confusion surrounding early release).

In an ideal world, with equal access to educational and employment-related programs it might be desirable to retain the bifurcated nature of remission: time off for program participation *and* for good behaviour. The Commission is of the view, however, that given the diverse nature of programs available to inmates in prisons and penitentiaries any system which actually awards credits for "active" program participation would result in inequities unless access to such programs is available in every institution. For inmates serving short sentences, programs and other opportunities for affirmative activities are often not available. Ideally, programs for inmates should be universally available, but until they are, it would be unfair to base a remission system on active participation in these programs.

10.2 The Commission recommends that earned remission be retained by way of credits awarded for good behaviour which may reduce by up to one-quarter the custodial portion of the sentence imposed by the judge.

Some commentators have suggested that remission in its present form cannot be an incentive scheme. By subtracting time-off credits for misbehaviour, they argue that the system is actually one of punishment. Inmates are not rewarded for good behaviour, but punished for bad. The distinction is a fine one, and may reflect the manner in which the system is presented, rather than the nature of the system *per se*. The Commission is of the view that earned remission is not a system that is exclusively punishment-oriented, and prison administrators should attempt to dispel the misperception that it is. An inmate entering a penitentiary with a six year sentence will be presumed to serve a six year term. If the inmate demonstrates good behaviour, he or she will be credited, on an accumulating basis, with time credits to reduce that six year period. As time passes without disciplinary incidents, the offender will earn these credits. The circumstances which will result in a removal of credits will be explicitly laid out at admission.

The proposals of this Commission aim to reduce the discrepancy between the sentence imposed and the time served. In moving toward a system of "real time" sentences, we have recommended the abolition of parole, and with it the

reduction of statutory maximum penalties. It is consistent with these proposals to lessen the proportion of a sentence which can be reduced by remission.

The effect of abolishing parole and reducing remission from one-third to one-quarter will be to make time served more closely correspond to the sentence imposed by the judge. However, by reducing the proportion of sentence remitted, and by abolishing parole, it will also be necessary to change sentencing practice. With these two changes the average time served will be considerably longer if sentencing practices remain the same. There is, therefore, a need to take other measures to ensure there is not a disproportionate increase in the punishment actually inflicted on the offenders (i.e. there is no substantial increase in time actually served). Commitment to the principle of restraint as well as the terms of its mandate require the Commission to take into account the effect of sentencing practices on prison capacity.

In recognition of this, the Commission has developed guidelines to assist judges in determining sentence lengths where imprisonment is felt to be the only acceptable sanction. The sentence ranges provided by these guidelines were constructed to ensure that sentences imposed will not result in a general increase in time spent in custody (see Chapter 11). As well, it is important to emphasize again that the greatest reduction in prison population will be achieved not through changes to custodial sentences, but through greater use of community sanctions.

2.3 Conditions Upon Release

The Commission has proposed the abolition of parole release. This section will focus solely on the “conditional” nature of early release due to remission. Should some or all inmates released from custody prior to the expiry of their warrant of committal be released on conditions, and if so, what should these conditions be? Until 1970 all inmates released as a result of remission were released unconditionally to serve the remainder of their sentence in the community. Thus, almost all inmates who were eligible for, but not granted parole release, were released after serving two-thirds of their sentence and could not be returned to custody for any reason other than the commission of a new criminal offence.

2.3.1 History

In 1970, the *Parole Act* was amended to give the National Parole Board the extended mandate to place conditions on remission-based release for federal inmates. All inmates who previously were not subject to any state control after serving two-thirds of their sentence were now to be subject to supervision and the prospect of revocation for breach of those conditions. The objective of “mandatory supervision” was to ensure that all federal inmates, not just those “better risks” who were granted parole, would receive assistance and control when they left the penitentiary. Mandatory supervision does not

apply to inmates serving sentences of less than two years in provincial institutions.

Hence, it was only after 1970 that the federal inmates released from custody on remission-based release came under public scrutiny since, for the first time, these offenders were released on conditions subject to the supervision of the parole board. Consequently, since 1970, the issue of offenders re-offending while on mandatory supervision has attracted both concern and controversy in the justice system and the news media.

2.3.2 Concerns

It is not surprising that a great deal of confusion surrounds mandatory supervision. The term mandatory is often understood as meaning “automatic” release, but the release is only automatic to the extent that once remission credits have been earned, the inmate is not subject to further review before he is released. The “automatic” nature of the release is a result of remission – and has been for over 100 years – not of “mandatory” supervision. In fact, the release is not “automatic”; it arises from remission which is credited for good behaviour and may be withheld when disciplinary infractions are committed.

The term “supervision” is in itself misleading. First, since *all* federal inmates released prior to their warrant expiry date (i.e. on parole and mandatory supervision) are under the control of the Parole Board, the actual “supervision” they receive is minimal. Inmates released on mandatory supervision must report to a parole officer, and are subject to conditions imposed by the Parole Board. These conditions may include a prohibition against drinking, owning guns, incurring debts and leaving a 25-mile radius without permission. Occasionally there is a condition requiring that the inmate reside in a half-way house upon release from custody. The average length of time an offender spends on mandatory supervision is 11 months (Correctional Law Review, 1985).

The Commission surveyed the opinions of probation and parole officers on a number of issues central to its terms of reference. Research was conducted in Québec (*Rizkalla, 1986*) and in the Atlantic Provinces (*Richardson, 1986*). Respondents were generally critical of the volume of paperwork required of them in fulfillment of their roles as parole or probation officers (*Rizkalla 1986*). Although most respondents in both Québec and the Atlantic Provinces acknowledged that their primary function was to supervise parolees, 52% of respondents in the Atlantic Provinces answered that their caseload was too heavy to allow them to exercise effective supervision. Twenty-eight percent of Québec respondents also believed that their caseload did not allow them to effectively supervise offenders on parole. Only 4% of Québec respondents did not voice reservations about the weight of their caseload.

Second, supervision is a misleading term in that it encompasses two very different aspects of early release: control (conditions) and assistance (re-

integration with the community). Parole officers are placed in the position of having to perform duties which sometimes conflict. Commission surveys of parole officers have shown that the majority of them believed that they were mostly performing a surveillance (control) function (*Rizkalla, 1986; 132; Richardson, 1986; Appendix B, p. 14*). For reasons of clarity, we will deal with the issues of control and assistance after the proposals are outlined.

2.3.3 Proposals

Within the context of the other proposals with respect to early release:

- 10.3 The Commission recommends that all offenders be released without conditions unless the judge, upon imposing a sentence of incarceration, specifies that the offender should be released on conditions.**
- 10.4 The Commission recommends that a judge may indicate certain conditions but the releasing authority shall retain the power to specify the exact nature of those conditions, modify or delete them or add other conditions.**
- 10.5 The Commission recommends that the nature of the conditions be limited to explicit criteria with a provision that if the judge or the releasing authority wishes to prescribe an “additional” condition, they must provide reasons why such a condition is desirable and enter the reasons on the record.**
- 10.6 The Commission recommends that where an offender, while on remission-based release, commits a further offence or breaches a condition of release, he or she shall be charged with an offence of violating a condition of release, subject to a maximum penalty of one year.**

Research shows that whether an offender is released with or without conditions has almost no effect on recidivism rates. Waller (1974) found that release on supervision merely postpones rather than prevents subsequent recidivism. When clients are no longer under conditions they offend at rates similar to those who have not been subject to conditions. Due to very heavy caseloads, parole officers simply do not have enough time to spend with their parolees. If conditions are reserved for the more serious cases, then the “supervision” may be more real and effective than its current illusory nature. The Commission is of the view that those offenders who require that conditions be set upon their release should be provided with real assistance and supervision. The current system of “supervising” all offenders on release misleads the public by implying that all offenders are indeed effectively supervised.

Consistent with the policy of the Commission that the judge should have a greater role in determining how the sentence should be carried out, we propose

that the judge, upon imposing sentence, specify whether or not the offender requires conditions upon his release on remission. If the judge decides that release conditions are required, he or she may further specify the nature of those conditions. These are in the nature of recommendations rather than a court order. This is to permit the subsequent change of conditions by releasing authorities who may be in a better position to assess the inmate at release. Although the discretion to set release conditions should remain with correctional authorities, the latter would be required to take into account the recommendations, if any, made by the court at the time of sentencing.

Currently, release on mandatory supervision may be suspended where a breach of a term or condition has occurred, to prevent a breach of a condition or “to protect society” (s. 16, *Parole Act*). If such a supervision is followed by revocation of the release, the offender is recommitted to custody and forfeits his/her earned remission.

The introduction of mandatory supervision – which resulted in conditions being imposed upon released inmates who otherwise would have left the institution free – engendered much bitterness in inmates. Many saw it as unfair in that having earned full release, this release was now being qualified. As a report by the Correctional Law Review (1985) notes: “the pre-1970 reward of scot-free time is no longer available and this fact alone has tended to undermine the meaningfulness of the program in the minds of many” (p.20). Also, while they had been denied conditional release on parole, they were now released under virtually the same conditions as parolees. Most offenders who obtain early release would, according to our proposals, do so without conditions; the incentive to earn that release should be substantially greater under the proposed remission scheme.

a) Control

In order to ensure that conditions are clear and enforceable, the court, in recommending conditions, and the administration in setting those conditions, must be guided by explicit criteria. The creation of an offence of violating a condition of release implies that the condition must necessarily be clear in order to be enforceable.

The criteria governing the kinds of conditions that may be imposed should be in the nature of the probation criteria specified in the Criminal Law Reform Act, 1984 (Bill C-19) (see Appendix I). In addition, there is a requirement that the criteria must be offence-related. If the court wishes to recommend a condition that is not expressly listed in the criteria, the court should provide the reasons why such a condition is considered desirable. The reasons will be entered in the record of the proceedings, or where not recorded, written reasons will be provided. The broader the scope of conditions, the easier it is to revoke conditional release. Given that revocation results in an extended time in custody the Commission felt that the exercise of discretion to impose conditions and to choose the nature of those conditions should be subject to explicit guidelines.

b) Assistance

For those offenders who have earned full remission credits and are released into the community after serving three-quarters of their sentence in custody, voluntary assistance programs should be made available.

10.7 The Commission recommends that voluntary assistance programs be developed and made available to all inmates prior to and upon release from custody to assist them in their re-integration into the community.

The provision of voluntary assistance programs prior to release into the community should be available to all inmates. In addition, most inmates who will be released after serving three-quarters of their sentence in custody may have benefited from other community-based programs prior to their release (see Day Release).

2.4 Withholding Remission Release

2.4.1 Recent Legislation

The controversy surrounding the release of all federal inmates who have earned their remission credits has culminated in the passing of legislation that permits the Parole Board to prevent the release of certain inmates who might pose a serious risk to the community.

This proposed procedure was originally referred to as “gating”. It referred to the process by which an inmate entitled to release according to remission credits could on the authority of the Parole Board be turned around at the gate and kept in custody. The very recent enactments to the *Parole Act* ensure that the inmate is no longer subject to last minute “gating”. Instead, the *Act* gives the Correctional Services the responsibility of identifying those inmates who, according to expressed criteria, might be subject to a review prior to their release on remission.

2.4.2 Proposals

Given the nature of the Commission’s package of proposals, the need for a mechanism such as this is greatly reduced. However, Parliament has recently expressed the view that in some exceptional cases there may be a need to withhold the release of offenders even though they have earned their remission credits. Since the effect of withholding release would be to prolong the inmate’s stay in custody for up to one-quarter of the sentence imposed, it is important that this procedure be restricted to exceptional cases, and that the decision to withhold release be made according to strict criteria.

10.8 The Commission recommends that a Sentence Administration Board be given the power to withhold remission release according to the criteria

specified in the recently enacted legislation: *An Act to Amend the Parole Act and the Penitentiary Act*.¹²

The Sentence Administration Board will ultimately replace the Parole Board.

The following procedure, similar to that prescribed in the recent legislative amendments is recommended by the Commission:

The Correctional Service of Canada would, according to criteria specified in the amendments, identify the inmate for review prior to remission release.

Once the inmate is identified for review, the Correctional Service of Canada may;

- i) set conditions for remission-based release (e.g., residence in a half-way house), or
- ii) recommend that release be denied and refer the case to the Sentence Administration Board.

An inmate is only subject to review if:

- i) he or she is convicted of an indictable offence listed in the Schedule (See Appendix I),
- ii) he or she has caused death or serious harm, and
- iii) there are reasonable grounds to believe that the inmate is likely to commit, prior to the warrant expiry date, an offence causing death or serious harm.

Where the Sentence Administration Board is satisfied that the inmate is likely to commit, prior to the warrant expiry date, an offence causing death or serious bodily harm, the Board *may*,

- i) direct that the inmate shall not be released on remission-based release, or
- ii) impose a condition on the release that the inmate reside in a community-based residential facility.

As specified in the amendments, this Board shall review, on a yearly basis, the case of every inmate who has been denied release on remission or whose release is subject to his or her residing in a community-based residential facility.

The decision by the Correctional Service of Canada to set conditions for release is reviewable by the Sentence Administration Board. The decision of the board to deny release is final, reviewable only by the existing modes of judicial review.

Correctional authorities are in the best position to identify those inmates who may be reviewed for purposes of withholding release on remission. Few

inmates would be subject to this review. In fact, it would affect only those who (a) were convicted of offences involving serious harm to persons (see Schedule, Appendix I) and (b) were considered by the correctional authorities likely to commit, prior to the sentence expiry date, an offence causing death or serious harm to another person.

Unlike the procedure set out in the amendments to the *Parole Act*, we propose that the Correctional Service of Canada be given the power to set conditions prior to release. Given that the Commission has recommended guidelines for the imposition of conditions, it is only necessary to refer a case to the Board when the Correctional Service of Canada recommends that release should be denied. In addition, the case may be referred to the Board if the inmate requests a review of the conditions. The Board would conduct its inquiry in a quasi-judicial manner to ensure that inmates' rights are fully respected. In order to ensure consistency of approach, one central decision-making body would be desirable.

2.5 Day Release

Under the current system, prior to full parole release or remission-based release inmates are eligible for day parole and temporary absence passes. Since these two release programs have different purposes, the Commission proposes separate recommendations for each.

Day parole is a program of release granted for the purpose of allowing an inmate to attend an educational, residential, treatment or other program approved by the institution. It was created in 1970, by amendment to the *Parole Act*. Day parole involves the release of an inmate from custody on a daily basis for a period of up to six months, and requires his or her return nightly to a minimum security institution or half-way house. Most inmates become eligible for day parole after serving one-sixth of their sentence or six months, whichever is greater. It is currently granted to inmates considered by the Parole Board to be good candidates for future full parole. The criteria for release are the same as full parole except that in the case of day parole the Board is not required to consider whether the inmate has "...derived the maximum benefit from imprisonment" (s.10, *Parole Act*).

Only federal inmates have a day parole program. In the provincial system, temporary absence passes, granted for a shorter period of up to 15 days, may be renewed by the prison administration to allow for an extended period of release that closely resembles parole ("back-to-back t.a.'s").

It is desirable for reasons of clarity, to distinguish a system of day release from short-term releases on temporary absence. The purpose of day release into the community prior to full release on remission is to aid in the re-integration of the offender in the community. Day release thus excludes temporary absences for humanitarian and medical reasons (illness, family death, etc.). The Commission is of the view that a system of day release should

be retained to allow inmates to be released at a point prior to their remission release date to attend courses, self-improvement programs or to work in the community, all measures which may ultimately facilitate their integration into the community.

10.9 The Commission recommends that all inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the requirements for withholding remission release.

Participation in the program should be available to all federal and provincial inmates except those few who may have their full release on remission withheld because of the serious nature of their crimes. The release at two-thirds of the sentence would be under the same conditions as currently specified for day parole (e.g., returning nightly to the institution or half-way house). It must be stressed that this is not a form of discretionary parole release and is not to be used as such by the prison administration. Unlike the current system of day parole, day release will not provide a "trial period" for suitability for full release. The decision as to whether an inmate should be granted day release depends on the availability and suitability of work and other day programs.

Given that day release is not a form of full release from custody and is more in the nature of providing opportunities for inmates than shortening the custodial portion of their sentence, the Commission is of the view that discretion as to whether to release an inmate for the purpose of attending such a program is best exercised by the prison administration.

For those inmates whose remission-based release is withheld according to the criteria, the only mechanism to ease their re-integration into society is through their participation in voluntary assistance programs. As was recommended earlier, voluntary assistance programs should be developed and made available to all inmates prior to and upon release, especially for those inmates who are not eligible to participate in a graduated release program.

2.6 Special Leave

There are currently two types of temporary absence passes: escorted and unescorted. The rationale underlying the escorted temporary absence pass is to provide a brief period of release for a specified length of time, under strict conditions, for humanitarian or medical reasons (e.g., for funerals or emergency medical attention). Escorted temporary absence passes are under the authority of the Correctional Service of Canada.

Release on an unescorted temporary absence pass (for a period of less than 72 hours per quarter) more closely resembles a form of limited day parole and is in fact used as a preliminary test for the day parole program. The authority to grant unescorted temporary absence passes lies with the Parole

Board, (although the Board delegates that authority to the Correctional Service of Canada for inmates serving less than five years and for a second or subsequent granting of an unescorted leave). Since the Commission has already made proposals regarding forms of day release, the unescorted temporary pass (as a system of day release) will not be addressed as an issue of "special leave". By special leave the Commission means leave in the nature of escorted temporary absences.

10.10 The Commission recommends that the granting of special leave according to explicit criteria remain at the discretion of the prison administration. Inmates shall be eligible for special leave passes immediately upon being placed in custody.¹³

Special leave should not be used as a method of re-introducing parole release. Its purpose is to provide a release mechanism in special circumstances for humanitarian or medical reasons, and the length of that release should be restricted to the minimum length of time necessary to achieve the specific purpose of the release.

2.7 Clemency

Clemency refers to mercy in the exercise of authority or power. With respect to sentences of imprisonment, clemency can affect early release by way of parole by exception or through the use of pardons as an exercise of the Royal Prerogative of Mercy or through the statutory power found in section 683 and 685 of the *Criminal Code*.

2.7.1 Parole By Exception

Pursuant to section 11.1 of the Parole Regulations, the Parole Board is given the power in some cases to grant full or day parole to a prisoner before he or she has reached the relevant statutory eligibility date. This form of release is known as parole by exception. A prisoner may be considered for parole by exception if he or she can satisfy one of the three statutory pre-conditions:

- a) the inmate is terminally ill;
- b) the inmate's physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement; or
- c) there is a deportation order made against the inmate under the *Immigration Act*, 1976 and the inmate is to be detained under that Act until deported.

In respect of a prisoner who meets one of these pre-conditions, the Parole Board can exercise discretion to grant parole prior to eligibility but only does so in exceptional cases. Significantly, the power to grant parole by exception is *not* available when the prisoner is serving a sentence of life imprisonment or an indeterminate sentence or a sentence which, according to the regulations is classified as a violent conduct offence.

As to condition (c), the Commission is of the view that deportation cases normally should have nothing to do with discretionary parole release or clemency. In the past, parole release has been used as an “artificial” procedure to allow deportation. The Commission suggests that it would be preferable to provide a specific authority in immigration law to allow for the deportation of convicted offenders in specified circumstances.

2.7.2 Pardons and the Royal Prerogative of Mercy

The Royal Prerogative of Mercy can be described as the “residue of discretion or arbitrary authority which ... is legally left in the hands of the Crown (Dicey, *Law of the Constitution*, 8th edition, 420, quoted in *Re: Royal Prerogative Mercy upon Deportation Proceedings*, [1933] 2 D.L.R. 348 (S.C.C.) at 351. In Canada, this prerogative empowers the sovereign’s representative, the Governor General, upon the advice of a Minister of the Crown, to grant a free pardon, conditional pardon or remission of sentence. The Governor in Council (the Cabinet) is empowered by sections 683 and 685 of the *Criminal Code* to grant free and conditional pardons, but this statutory power does not restrict the availability or exercise of the Royal Prerogative of Mercy. In practice, applications are administered by the Clemency Division of the National Parole Board who conduct the necessary investigations and make recommendations to the Solicitor General. The Solicitor General then advises the Governor General or Governor in Council as the case may be.

While there may be some controversy as to the scope of the appropriate premises to consider applications, the Policy and Procedures Manual of the National Parole Board describes the power to intervene in lawfully imposed sentences as arising when “the fallibility of human institutions has produced a condition of hardship and inequity”. Inequity is said to exist when “the consequences which flow from either the sentence or conviction are out of proportion to the nature of the offence and the consequences which would have resulted in the typical case”. Recognizing the need to maintain the independence and authority of the judiciary, Parliament has enacted section 617 of the *Criminal Code* which empowers the Minister of Justice to refer cases back to the courts for reconsideration after all ordinary routes of appeal have been exhausted. This power, only rarely exercised, usually arises in cases of new evidence and has substantially limited resort to the Royal Prerogative of Mercy in respect of claims of injustice.

2.7.3 Proposals

Consistent with the Commission’s proposals regarding the abolition of full parole release, and given that cases involving hardship and inequity fall within the purview of the Royal Prerogative of Mercy, the Commission recommends that only the Royal Prerogative of Mercy be retained.

10.11 The Commission recommends that parole by exception be abolished and that cases where the inmate is terminally ill or where the inmate’s

physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement shall be dealt with by way of the Royal Prerogative of Mercy.

- 10.12 The Commission recommends that the Sentence Administration Board should conduct the necessary review and forward submissions regarding clemency to the Solicitor General.**
- 10.13 The Commission recommends that the Canadian immigration law should provide the necessary authority for the deportation of convicted offenders in specified circumstances.**

3. Open Custody

3.1 The Meaning of Custody

Early release has a major impact on the meaning of a sentence of imprisonment. It materially affects the length of time an inmate actually serves in custody. The meaning of “custody” itself, however, depends on whether the sentence is to be served in complete segregation or involves less extreme deprivations of freedom.

The Commission has previously recommended that the court should have a greater role in determining how the sentence is carried out. The Commission has also recommended that the role of the judge in imposing the sentence be expanded, recognizing that the sentencing process does not end at the imposition of the sentence.

3.2 Proposals

At present, custodial sentences involve varying degrees of constraint on the offender. To reduce the demand on secure custody prison resources, less constraining facilities should be made available to appropriate offenders. Consistent with our policy of restraint, we recommend that, in appropriate cases and given the existence of an open custody facility, the role of the judge in sentencing the offender should be expanded to enable the judge to sentence an offender to open custody. The Commission believes that the judiciary should have a greater role in determining the degrees of custody to which an inmate should be subject.

- 10.14 The Commission recommends that where a judge imposes a custodial sanction, he or she may recommend the nature of the custody imposed.**
- 10.15 The Commission further recommends that federal and provincial governments provide the necessary resources and financial support for the establishment and maintenance of open custody facilities.**

The Commission recognizes the need to give judges a greater say as to the nature of the sanction imposed, be it a community sanction or a custodial term. This recommendation stresses the importance of expanding both the choice of sanction and the role of the judge in recommending the nature of that sanction. If the principle of restraint is to be given proper scope and use, facilities providing something less than secure custody are required. Furthermore, the cost of establishing and maintaining open custody facilities should be considerably less than that of secure custody institutions. It should be noted here that the sentencing guidelines will ensure that open custody facilities are used only for those cases where custody is justified and not in cases where less onerous sanctions might otherwise be imposed.

The prison administration currently decides whether a sentence will be served in open custody (e.g., a bush camp, a farm camp or a community training residence) or closed custody (e.g., a prison or penitentiary). This recommendation empowers a judge to recommend that the sentence may be served in an open custody facility, where such a facility is available. If judges are to have any meaningful role in determining the nature of the custodial sentence imposed, federal and provincial governments must pledge the necessary resources to expand existing open custody facilities and make them available for initial sentencing. In addition to presently existing facilities, new types of institutions for sentences of open custody could eventually be created in rural or urban settings. These new facilities could receive convicted offenders serving an intermittent sentence or could be used to allow convicted offenders to keep their jobs and support their families.

The purpose of the Commission's recommendations is not to provide judges with an exhaustive list of custodial settings, but rather to stress that judges should be given greater scope to determine the meaning of the sentence imposed (ranking from community sanctions to closed custody). In specifying the nature of the "in" decision, the judge may clearly state to the offender and to the public the reason for the custodial sentence and the nature of custody required. There exist a number of choices regarding the nature of the custodial sanction. For example, it could be an intermittent sentence served on weekends in jail or in some other appropriate institution. As a further example, the sentence could require the accused to serve the custodial term in a half-way house.

As will be described in detail in Chapter 11, the decision of the judge as to whether to impose a custodial sentence will be guided by a "presumptive" disposition and range. If the judge feels that the circumstances require a custodial sanction, the next decision he or she faces is the nature of the "in" sanction. Earlier it was decided that restraint in the use of imprisonment was a principle which would require judges to consider all less onerous sanctions before imposing a custodial term. Clearly, open custody or an intermittent sentence is less onerous than a term of continuous and secure custody. The principle of restraint, then, will serve to guide the judge as to the type of custody to impose.

An enhanced role for the judiciary in determining the degrees of custody to which an inmate will be subject is consistent with real-time sentencing – it minimizes the degree to which the sentence of the court is undermined by “post-sentencing” decisions, and can only improve the understanding of the court and sentence administrators as to the meaning of the custodial sentence.

The Commission feels confident that in determining the nature of the custody, a judge will consider whether the offence was of such a violent nature that a term of “separation” in a closed custody setting is required. As well as considering the circumstances of the offence, the judge shall consider whether an open custody sentence would benefit the offender (e.g., in permitting him/her to continue working) or the offender’s family (in preserving the family structure), or the community generally.

Two final points. First, the issue of open custody is not an early release issue. In the past, back-to-back temporary absences and day parole have been used to mitigate the harshness of a closed custody sanction. These decisions, however, are made by sentence administrators, not sentencing judges. Recommendations made earlier regarding release mechanisms and the use of temporary absences and day releases will serve to ensure that these mechanisms are no longer used to provide an open custody type of sanction. Instead, early release mechanisms will be restricted to providing a “release” function for the most onerous sanction, closed custody.

Second, these recommendations regarding open custody are not intended to affect or limit daily decisions of correctional authorities as to whether inmates should, for example, be transferred from maximum security to less secure institutions.

4. Sentences for Murder and High Treason

4.1 The Meaning of a Mandatory Life Sentence

In an earlier decision, the Commission resolved not to deal with the issue of capital punishment and to retain the mandatory life sentence for first and second degree murder and high treason. Having decided this, it followed that the penalty provisions for murder and high treason should be preserved. It was felt that a review of these penalties would necessarily entail a consideration of the death penalty, which implied stepping beyond the mandate of this Commission (see Chapter 1). However, in furtherance of the goals of the Commission, it was apparent that a review of the ineligibility periods for these offences was necessary. These three offences have unique characteristics: first, the sentence of life imprisonment is mandatory, and second; the meaning of the life sentence depends on the period of parole ineligibility prescribed by the *Code* or imposed by the judge.

Currently, inmates serving sentences of life imprisonment for offences other than murder and high treason are eligible for parole release after serving

seven years. First degree murder and high treason have a mandatory parole ineligibility period of 25 years. For these two offences an offender must serve 25 years *in custody* prior to eligibility for parole release. Second degree murder has a minimum parole ineligibility period of ten years which can be increased up to a maximum of 25 years. However, it appears that judges have generally been reluctant to exceed this ten year period. In over three-quarters of cases of second degree murder (1976-1983) the minimum ten year period was not increased (Canada, Solicitor General, 1984a).¹⁴ In the case of first degree murder and high treason and where the parole ineligibility period for second degree murder has been increased in excess of 15 years, there is a provision for a judicial review (with a jury) after an inmate has served 15 years in custody.

4.2 Prison Populations

There has been extensive criticism of the 25 year term of custody without the possibility of parole. Many see it as inhumane: inmates have no opportunity to mitigate their sentences. Those inmates serving sentences of life imprisonment without the possibility of release for so long have no incentive to conform to institutional rules. Easily accessible data on the institutional behaviour of this group are not currently available. The data that do exist suggest that these inmates are more likely than the average inmate (i.e. the inmates with parole and remission opportunities) to be involved in institutional incidents. A review by the Correctional Service of Canada of 190 inmates serving a 25 year minimum term revealed that 47% had been involved in incidents recorded by the Preventive Security Division (Canada, Solicitor General, 1984a; 31).

At the present time there are 307 inmates serving life sentences for first degree murder (Correctional Service of Canada, 1986; 25). A projection exercise carried out in 1984 (reported in Canada, Solicitor General, 1984a; 33) predicted a first degree murder population of 877 by the year 2001.

4.3 Proposals

The maximum penalty of life imprisonment for all offences except murder and high treason has been reduced to 12 years or less under our proposed maximum penalties. For exceptionally serious crimes, we are proposing that for offences carrying a 9 or 12 year maximum penalty the judge may enhance the sentence by up to one-half. Within the framework of these proposals and of our theory of sentencing, the Commission is recommending that the mandatory life sentences for murder and high treason be retained. However, in light of concerns surrounding proportionality, consistency and restraint, the parole ineligibility periods for these offences have been reviewed.

Recognizing the need for consistency of approach to the meaning of sentences of imprisonment:

- 10.16 The Commission recommends that the mandatory life imprisonment sentence be retained for first and second degree murder and high treason.**

- 10.17** The Commission recommends that inmates serving sentences for first degree murder or high treason be eligible for release on conditions after serving a minimum of 15 years up to a maximum of 25 years in custody. The court would set the date of eligibility for release within that limit.
- 10.18** The Commission recommends that inmates serving a life sentence for second degree murder be eligible for release on conditions after serving a minimum of ten years, and a maximum of 15 years in custody. The court would set the date of eligibility for release within that limit.
- 10.19** The Commission recommends that at the eligibility date, the inmate have the burden of demonstrating his or her readiness for release on conditions for the remainder of the life sentence.
- 10.20** The Commission recommends that the ineligibility period set by the court be subject to appeal.

The Commission recommends that the maximum ineligibility period for second degree murder be decreased from 25 years to 15 years in order to distinguish it from the more serious offence of first degree murder. The sentence for second degree murder could involve up to 15 years custody before consideration for release. If at the eligibility date the inmate can demonstrate to the court that he or she could safely be released into the community, then the inmate would be released to serve the rest of his or her sentence, that is life, subject to appropriate conditions supervised by the Sentence Administration Board. These recommendations change only the length of time served in custody prior to eligibility for early release. The current mandatory sentence of life imprisonment for first and second degree murder and high treason remains the same.

5. List of Recommendations

- 10.1** The Commission recommends the abolition of full parole, except in the case of sentences of life imprisonment.
- 10.2** The Commission recommends that earned remission be retained by way of credits awarded for good behaviour which may reduce by up to one-quarter the custodial portion of the sentence imposed by the judge.
- 10.3** The Commission recommends that all offenders be released without conditions unless the judge, upon imposing a sentence of incarceration, specifies that the offender should be released on conditions.
- 10.4** The Commission recommends that a judge may indicate certain conditions but the releasing authority shall retain the power to specify the exact nature of those conditions, modify or delete them or add other conditions.

- 10.5 The Commission recommends that the nature of the conditions be limited to explicit criteria with a provision that if the judge or the releasing authority wishes to prescribe an “additional” condition, they must provide reasons why such a condition is desirable and enter the reasons on the record.
- 10.6 The Commission recommends that where an offender, while on remission-based release, commits a further offence or breaches a condition of release, he or she shall be charged with an offence of violating a condition of release, subject to a maximum penalty of one year.
- 10.7 The Commission recommends that voluntary assistance programs be developed and made available to all inmates prior to and upon release from custody to assist them in their re-integration into the community.
- 10.8 The Commission recommends that a Sentence Administration Board be given the power to withhold remission release according to the criteria specified in the recently enacted legislation: *An Act to Amend the Parole Act and the Penitentiary Act*.
- 10.9 The Commission recommends that all inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the requirements for withholding remission release.
- 10.10 The Commission recommends that the granting of special leave according to explicit criteria remain at the discretion of the prison administration. Inmates shall be eligible for special leave passes immediately upon being placed in custody.
- 10.11 The Commission recommends that parole by exception be abolished and that cases where the inmate is terminally ill or where the inmate’s physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement shall be dealt with by way of the Royal Prerogative of Mercy.
- 10.12 The Commission recommends that the Sentence Administration Board should conduct the necessary review and forward submissions regarding clemency to the Solicitor General.
- 10.13 The Commission recommends that the Canadian immigration law should provide necessary authority for the deportation of convicted offenders in specified circumstances.
- 10.14 The Commission recommends that where a judge imposes a custodial sanction, he or she may recommend the nature of the custody imposed.
- 10.15 The Commission further recommends that federal and provincial governments provide the necessary resources and financial support for the establishment and maintenance of open custody facilities.

- 10.16** The Commission recommends that the mandatory life imprisonment sentence be retained for first and second degree murder and high treason.
- 10.17** The Commission recommends that inmates serving sentences for first degree murder or high treason be eligible for release on conditions after serving a minimum of 15 years up to a maximum of 25 years in custody. The court would set the date of eligibility for release within that limit.
- 10.18** The Commission recommends that inmates serving a life sentence for second degree murder be eligible for release on conditions after serving a minimum of ten years, and a maximum of 15 years in custody. The court would set the date of eligibility for release within that limit.
- 10.19** The Commission recommends that at the eligibility date, the inmate have the burden of demonstrating his or her readiness for release on conditions for the remainder of the life sentence.
- 10.20** The Commission recommends that the ineligibility period set by the court be subject to appeal.

Endnotes

- ¹ Comparisons are often made between the incarceration rates of Canada and the U.S.. Although in Canada the incarceration rate is less than half what it is in the United States there is even a larger difference between crime rates. Violent crime is five times more frequent in the U.S. One recent report concludes that our courts "are at least twice as harsh as their American counterparts" (Correctional Service of Canada, 1985; p. 18).
- ² For information upon the approach of this project, see *Correctional Law Review* (1986a, b) for recently released working papers.
- ³ The National Parole Board is an independent government agency reporting to Parliament through the Solicitor General of Canada. Although the Board in its day-to-day operations works closely with the Correctional Service of Canada, an agency within the same Ministry, the National Parole Board remains independent in its decision-making (Government of Canada, National Parole Board, *National Parole Board Handbook for Judges and Crown Attorneys*, 1983, p. 12).
- ⁴ See *Parole Act*, section 2, definition of "day parole" and "parole" and *Parole Regulations*, section 2 for definition of "full parole".
- ⁵ Parole eligibility for inmates serving indeterminate sentences or sentences for murder and high treason will be dealt with separately later in this chapter. A "violent conduct offence" is one carrying a maximum penalty of ten years or more for which a sentence of five years or more was actually imposed and which involved conduct that seriously endangered the life or safety of any person or resulted in serious bodily harm or severe psychological damage to any person (*Parole Regulations*, ss. 8(1)). Inmates serving a sentence for a violent conduct offence are not eligible for full parole until they have served one-half of their sentence or seven years, whichever is the lesser.
- ⁶ This finding has consequences for general deterrence. We have already referred to comprehensive reviews of the literature on general deterrence. As noted by those reviewers, the force of deterrence is weak at best and not particularly a reflection of the severity of the punishment per se. (Some have known this for some time. Thomas (1979) quotes a writer in 1892 who noted that "moderate sentences are as effective as excessive ones in the repression of crime" (p. 21). Contemporary data support what was merely speculation almost a century ago). However, whatever deterrent effect does exist must perforce be diluted – irreparably perhaps – by the intervention of discretionary release. Deterrence can only be obtained when offenders and potential offenders can predict with accuracy the penalty which will follow conviction for a particular offence.
- ⁷ This issue is particularly relevant to impact studies attempting to assess the effects of abolishing parole. For, as Michael Mandel (1975) pointed out, there are in fact two effects of parole on sentence length: the direct effect and the indirect effect. By direct effect he refers to the intuitive notion that parole release results in less incarceration. By indirect effect he means a less obvious effect in the opposite direction: "Sentencers have merely lengthened the sentences they would otherwise have imposed in view of the fact that offenders may be paroled before the entire sentence is served." (p. 512). The net effect of parole then results from consideration of both these effects. Attempts at estimating them are difficult although Mandel estimates the direct effect to be a reduction of 10% in the time spent in prison and the indirect effect to be an increase of 11%.
- ⁸ It was in the recognition of the need for a uniform approach to the administration of sentences that the Law Reform Commission of Canada in its report "Imprisonment and Release" (1976) recommended the creation of a "sentence supervision board" to replace the current parole board. According to its recommendations, a judge would state the purpose of any sentence imposed. If the purpose was to separate the offender from the community because of the serious and harmful nature of his acts, then a pre-determined staging of early release would apply. The presumption would be that inmates would be granted stages of release at set points

in their sentences unless the sentence supervision board could show why they should not be released.

9. One of the putative benefits of parole concerns the reduction of violent crime. Compared to remission-based release (on mandatory supervision) offenders on parole are said to be less likely to recidivate. Comparison of the two populations however demonstrates little difference between them. Recent data from the National Parole Board (1986; Table 1) show that 1.8% of full parole releases were revoked for committing a violent offence. The comparable figure for mandatory supervision is 2.7%. Likewise for robbery: the percentage revoked for robbery is 2.8% for parole and 3.3% for mandatory supervision. These figures are outcomes to 1984 of releases from 1975/76 to 1979/80 (see also pp. 16-18 in Corrections Policy Division, 1985a). During 1983, of all releases to parole, 226 committed fresh offences. Violent offences (crimes against the person and robbery) comprised 22.5% of these (51 of 226). The comparable figures for mandatory supervision are: 561 re-offend, 22% violent offences (122 of 561). (Corrections Policy Division, 1985, p. 20). These figures hardly suggest that release on parole reduces the likelihood of violent re-offending.
10. The importance of an early "time-fix" is argued in greater detail in a report entitled *Abolish Parole?* (von Hirsch and Hanrahan, 1978).
11. See *Penitentiary Act*, sections 24(1), 24.2, 2.1(1).
12. *An Act to Amend the Parole Act and the Penitentiary Act*, Statutes of Canada, 1986, c. 42.
13. A similar recommendation was made by the Québec *Comité d'étude sur les solutions de rechange à l'incarcération*. See Document de Consultation, May 1986, p. 16.
14. This same report (Canada, Solicitor General, 1984a) shows that judges have a strong tendency to impose 10 or 15 year parole ineligibility periods. Thus 76% of cases are ten, with a further 9% at 15. Although many periods varying in length from 10 to 25 years could be imposed, in 85% of the cases they are either 10 or 15.

Chapter 11

Sentencing Guidelines

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Chapter 11

Sentencing Guidelines

In the course of its consultations and opinion surveys of criminal justice professionals, the Commission found that the notion of sentencing guidelines was the object of serious misunderstanding. The most crucial of these was the mistaken belief that any guidelines which are developed by a source other than Courts of Appeal are mandatory in nature and take away the discretion of the sentencing judge. In order to dispel the most profound misperceptions, this chapter will begin with a brief overview of the Commission's recommendations on sentencing guidelines.

The notion of guidelines must at the very beginning be distinguished from a form of mandatory prescription. A complete set of guidelines has four components: a sentencing rationale; guidance on what type of sanction is viewed to be appropriate; numerical ranges for sanctions which involve a determination of *quantum* (e.g., for imprisonment and fines); and finally an indication of the degree of constraint implied by the guidelines.

The Commission has already recommended a *sentencing rationale*, which takes the form of a Declaration of the Purpose and Principles of Sentencing. This part of the guidelines, which is general and allows for flexibility of application, would be incorporated in the *Criminal Code*. The other components of the set of guidelines recommended by the Commission are not intended to be enacted as legislation. They will be presented to Parliament and will come into force unless rejected by negative resolution of the House of Commons. This procedure will be explained in more detail later in the chapter.

Guidance on the *nature of the sanction* which is deemed appropriate is basically intended to assist the sentencing judge in deciding whether an offender should receive a community sanction or a sentence of imprisonment. This is usually referred to as the "in/out" decision. Guidance for the in/out decision is provided by four presumptions: incarceration in all cases except when the judge feels justified to depart from the presumption (a "presumptive in"); incarceration in a majority of cases (a "qualified in"); a community sanction in all cases except, again, when the judge feels justified in departing from the presumption (a "presumptive out"); and finally, a community

sanction in the majority of cases (a “qualified out”). The guidelines do not specify what kind of custody – closed, open or intermittent – is to be imposed by the judge, nor do they specify the type of community sanction to be imposed. These decisions, which imply individualizing the sentence, are left to the discretion of the judge.

Numerical guidance is provided in the form of presumptive ranges for sentences of incarceration. For reasons to be explained later, the Commission did not determine presumptive ranges for all offences. It chose rather to present prototypes of numerical ranges for a sample of offences.

The words “presumption” and “presumptive” refer to the *degree of constraint* which is implied by the establishment of guidelines. It is expected that sentencing judges will find the guidelines useful and reasonable and that in most instances they will follow them. However, they may also depart from the guidelines. In fact, it is expected that they will depart in appropriate circumstances, for no guidelines can accommodate all cases. Where the judge determines that a departure from the guidelines is justified the only further requirement is that explicit reasons be provided for the departure, which would be subject to appellate review. The provision of explicit reasons will facilitate appellate review of the trial court decision, if an appeal is made, and the development of jurisprudence with respect to the application of the guidelines in particular cases.

Finally, the guidelines enumerate a list of aggravating and mitigating circumstances which may be used to determine the sentence within the presumptive range and which may serve as grounds for departing from the guidelines. Although this list is not exhaustive it provides the judge with what the Commission considers to be the primary and most relevant grounds for departures. The list of aggravating and mitigating factors is also accompanied by general principles relating to the use of such factors in sentencing.

The guidelines are not presented in a mathematical format, such as a grid, a formula or a points system. The guidelines are presented in a series of guideline sheets, which may be collected together in a sentencing manual (see Appendix F for prototypes of guideline sheets). In addition to stating presumptive dispositions and ranges, the guideline sheets provide advisory information for the judge (such as statistics on current sentences for a particular offence and appellate jurisprudence).

One of the most important functions of the permanent sentencing commission will be to update these sentencing guidelines. The Commission recommends the establishment of an advisory judicial council, which will have as its members a majority of trial judges. The permanent sentencing commission will have to consult this council before presenting an updated version of the guidelines to Parliament. Finally, the Commission also proposes that section 614 of the *Criminal Code* be amended so that Courts of Appeal will be authorized to go beyond reviewing the fitness of sentences and play a greater role in the determination of sentencing policy. The Commission will recommend that Courts of Appeals have the power to modify the presumptive

ranges for custodial sentences in their respective jurisdictions. It is to be hoped that the necessity of introducing such changes will not arise frequently. We will provide examples of situations where modifications to a presumptive range may arise.

This chapter is divided into five parts. It will begin with a discussion of the Commission's terms of reference on sentencing guidelines. Part two deals with how sentencing guidelines are perceived by the general public and by criminal justice professionals. Part three is devoted to a review of the different models of sentencing guidelines. Part four formulates the conditions which have to be met by a model of sentencing guidelines in order to be adequate in the Canadian context. Finally, part five presents the model which is recommended by the Commission and describes its main features.

1. The Commission's Terms of Reference

The sections of the terms of reference which relate to the development of sentencing guidelines require the Commission:

- (b) to examine the efficacy of various possible approaches to *sentencing guidelines*, and to develop model guidelines for sentencing and advise on the most feasible and desirable means for their use, within the Canadian context, and for their ongoing review for purposes of updating;
- (c) to investigate and develop separate *sentencing guidelines* for:
 - (i) different categories of offences and offenders; and
 - (ii) the use of non-carceral sanctions;
- (d) to advise on the use of the *guidelines* and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice including:
 - (i) *prosecutorial discretion*, plea and charge negotiation;
 - (ii) *mandatory minimum* sentences provided for in legislation; and
 - (iii) *the parole and remission* provisions of the Parole Act and the Penitentiary Act, respectively, or regulations made thereunder, as may be amended from time to time; and
- (e) to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of *information systems* necessary for the most efficacious use and *updating of the guidelines*.

The Committee further advise that the Commissioners be guided, in the development of any model guidelines, by the policy and approach that such guidelines should:

- (f) reflect the fundamental principles and purposes of sentencing as set forth in any legislation that may be adopted by Parliament,

and in the *Statement of Purpose and Principles* set out in *The Criminal Law in Canadian Society*;

- (g) be based on relevant criminal offence and offender characteristics;
- (h) indicate the appropriate sentences applicable to cases within each category of offence and each category of offender, including *the circumstances under which imprisonment of an offender is proper*;
- (i) *if a sentencing guideline indicates a term of imprisonment, recommend a time, or range in time for such a term*; and an appropriate differential between the maximum and the minimum in a range;
- (j) *include a non-exhaustive list of relevant aggravating and mitigating circumstances* and indicate how they will affect the normal range of sentence for given offences; and
- (k) take into consideration sentencing and release practices, and existing penal and correctional capacities.

(emphasis added)

1.1 The Pivotal Position of Guidelines

The Commission's terms of reference have a striking feature. Although they can be broken down into several different issues, each issue except maximum penalties is formulated in relation to sentencing guidelines. Quoting the sections of the terms of reference which refer to sentencing guidelines is tantamount to citing the whole mandate of the Commission (with the exception of subsection (a), which concerns maximum penalties). A glance at the words which we have emphasized shows immediately that minimum penalties, prosecutorial discretion, early release and information systems are all presented as dependent issues, which stem from the central issue of sentencing guidelines. These issues, which are not by any means peripheral, have been dealt with in separate chapters of this report. Nevertheless, the wording of the Commission's mandate stresses the inter-connection of all aspects of its mandate, within a framework of sentencing guidelines.

1.2 Narrowing the Scope of Sentencing Guidelines

Sections (b) and (c) of the terms of reference bear exclusively on sentencing guidelines and, as such, they direct the Commission to develop separate guidelines for different categories of offences and offenders and also for the use of non-carceral sanctions. It can be argued, just by referring to these sections, that the Commission's mandate is broader than any of the past U.S. sentencing guidelines commissions, which were to make recommendations only on carceral sanctions.

With regard to non-carceral sanctions, the Commission recommends in the next chapter that specific orientations be followed; it also issues specific guidelines to address the problem of imprisonment for fine default. The Commission could have invested its limited time and resources in the development of a detailed presumptive scheme for all community sanctions. However, assuming that there is a greater need for guidance in decisions which entail the most serious social and financial consequences, the Commission has developed precise guidelines only for the use of incarceration.

The Commission also chose to interpret in a broad sense sub-section c(i) of its mandate. Hence, the recommended guidelines differentiate between crimes of violence and non-violent property offences. Likewise they also differentiate first-time offenders from persistent recidivists. However, the Commission is of the opinion that distinguishing between offenders who perpetrate variations of the same offence generally belongs to the sentencing judge. For example, a hockey player who strikes and injures a player from an opposing team with his stick and a burglar who harms a security guard may be convicted of the same offence (e.g., assault causing bodily harm, according to section 245.1(1)(b) of the *Criminal Code*); they may also belong to different categories of offenders. However, the Commission does not recommend that separate guidelines apply to these assumed categories of offenders.

1.3 Fulfilling the Terms of Reference

A comparison between the terms of reference of the Commission and the sentencing guidelines which it recommends reveals that there is a fair measure of correspondence between the two and that the Commission has fulfilled its mandate. All four components of the sentencing guidelines which we have briefly described in the introduction to this chapter are explicitly mentioned by the Commission’s mandate as being constituent parts of an integrated set of guidelines.

| <i>Components of the Commission’s Recommended Guidelines</i> | <i>Relevant Sections of the Terms of Reference</i> (“...such guidelines should”:) |
|--|--|
| Sentencing rationale | (f) reflect the fundamental principles and purposes of sentencing |
| Guidance on the nature of the sanction | (h) indicate the appropriate sentences applicable to cases...including the circumstances under which imprisonment of an offender is proper |

*Components of the Commission's
Recommended Guidelines*

*Relevant Sections of the
Terms of Reference*

("...such guidelines should":)

Numerical ranges

(i) if a sentencing guideline indicates a term of imprisonment, recommend a time, or range in time for such term; and an appropriate differential between the maximum and the minimum in a range

Aggravating and mitigating factors

(j) include a non-exhaustive list of relevant aggravating and mitigating circumstances

It should be noted with regard to section (h) that the Criminal Law Reform Act, 1984 (Bill C-19) formulated general principles referring to the circumstances under which a term of imprisonment was seen as being appropriate. However, it was assumed by the authors of the Commission's terms of reference that Bill C-19 would be dealt with by Parliament shortly after the Commission began its proceedings in May, 1984. Hence, section (h) of the terms of reference obviously implies that the Commission's sentencing guidelines must go beyond the formulation of general principles regarding the circumstances in which incarceration is appropriate. If Bill C-19 had not died on the order paper, such principles might already be in force.

1.4 The Need for Guidelines

The importance of developing sentencing guidelines is further underlined by the fact that they are explicitly presented in the preamble of the terms of reference as providing assistance in achieving the goals of fairness, equity, certainty and effectiveness in sentencing:

WHEREAS fairness, certainty, effectiveness and efficiency are desirable goals of sentencing law and practices;

WHEREAS unwarranted disparity in sentences is inconsistent with the principle of equality before the law;

WHEREAS sentencing guidelines to assist in the attainment of those goals have been developed for use in other jurisdictions and merit study and consideration for use in Canada;

Sentencing guidelines are not simply a means of achieving sentencing goals, such as fairness and equity, which have been the perennial concerns of criminal justice. They perform an absolutely vital role in the Commission's proposed reform of sentencing. If we abolish parole and a proportion of earned remission without reducing the length of sentences of incarceration actually imposed by judges, the consequences of the inevitable swelling of the prison population will

be quite dramatic. Since the 1977 MacGuigan Report, the warnings about prison overcrowding have multiplied. The 1984 Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions declared in its report (Canada, 1984; 38):

Our Committee is convinced that the normal tensions of prison life have been seriously exacerbated in recent years by the problem of overcrowding. The average inmate population in federal institutions has increased by 26 percent since 1977. Most institutions are operating either above or very close to capacity, and the entire range of services and programs available to inmates is being heavily taxed.

It would be irresponsible to increase to a significant extent the pressures on prisons and penitentiary populations. Sentencing guidelines are a crucial tool to offset the increase in inmate populations which will result from the abolition of full parole release. The curtailing of early release programs and the development of sentencing guidelines on the use of incarceration should be considered as two faces of the same coin.

Systematic collection of data on sentencing at the federal level has virtually ceased since the early 1970's. It is hopeless to attempt to remedy disparity without having knowledge of the sentences which are currently imposed. Seventy-nine percent of the judges who answered a Commission survey favoured having a better information system about current sentencing practice. No fewer than 70% supported the use of a computer system to provide basic sentencing information about individual cases. Not only is sentencing information scattered over different jurisdictions and administrative departments, but information requirements have low priority in times of financial restraint, unless they spring from the immediate needs of practice. The implementation of sentencing guidelines and their updating by a permanent sentencing commission will provide the basis for the establishment of adequate sentencing information systems.

2. Perceptions

When the Commission surveyed the opinions of the public and criminal justice professionals, it had not yet made its decisions regarding the kind of sentencing guidelines that it would recommend. The opinions which were canvassed by the Commission refer to guideline models current in foreign jurisdictions when the surveys were made. The Commission's recommended model, which is not equivalent to any previous or existing model, could not be used to elicit opinions in these surveys.

One thing should be borne in mind in assessing public perceptions. Among all issues on which the Commission makes recommendations, the issue of sentencing guidelines is by far the most unfamiliar to the public. Even if its knowledge of the criminal law is quite limited, the public is at least aware of notions such as maximum penalties, early release and plea negotiations. We should expect that being unfamiliar with the notion of sentencing guidelines,

the general public will not voice specific opinions thereon. One would also expect a reluctance to endorse what is new. The more recent models of sentencing guidelines, such as presumptive sentences, mathematical formulas and sentencing grids are bound to generate the greatest reservations because they are also the most unfamiliar. Suspicions of the unknown and a resistance to change are understandable and should be expected.

2.1 Public Submissions

The issue of sentencing guidelines did not elicit very informative proposals from the individuals and groups who submitted comments. Although the Advisory Council on the Status of Women (New Brunswick) and a few individuals recommended the use of a point system in sentencing decisions, only two submissions (the Law Reform Commission of Canada and the John Howard Society of Ontario) made specific proposals for sentencing guidelines.

If the submissions do not, with few exceptions, really tackle the issue of sentencing guidelines *per se*, they do shed light on some of the issues related to sentencing guidelines. There appears to be consensus on four issues:

a) *The need for sentencing guidelines:*

With the exception of the John Howard Society of Alberta and the Northwest Territories Defence Lawyers' Association, all groups and individuals who voiced an opinion on this issue agreed that there is a need for more guidance in sentencing (e.g., the John Howard Societies of Canada and Ontario, the Law Reform Commission of Canada, Legal Aid Manitoba, the Canadian Association of Chiefs of Police, the Alberta Solicitor General, the Metro Action Committee on Public Violence Against Women and Children, Ontario Women's Directorate and several individual submissions). Interestingly, the Solicitor General of Alberta has proposed that there should be guidelines with regard to incarceration for failure to pay a fine.

b) *The creation of a permanent sentencing commission:*

Almost without exception all briefs from professional and voluntary associations and those of several individuals were favourable to the creation of a permanent sentencing commission (e.g., the John Howard Societies of Canada and Ontario, the Law Reform Commission of Canada).

c) *The implementation of a sentencing information system:*

The John Howard Societies of Ontario and Alberta, the Canadian Bar Association as well as a number of individual submissions viewed the implementation of adequate information systems as vital to both sentencing determinations and to monitor feedback.

d) *The need for judicial discretion:*

No submissions advocated the elimination of judicial discretion. Rather, there was recognition of the necessity of preserving judicial discretion in the sentencing process.

An issue which generated conflicting positions was whether the formulation of guidelines should be left to the Courts of Appeal. This was the position taken by the Alberta Attorney General and the Alberta Status of Women Action Committee. However, Manitoba Legal Aid and several individuals were critical of Courts of Appeal. For example, Manitoba Legal Aid stated that guidelines provided by Courts of Appeal are overly harsh and rigid, whereas many individuals declared that jurisprudential guidelines do not provide enough guidance.

Finally, there were two comments by the Ontario John Howard Society which warrant special mention. The first was that guidelines should be formulated with a view to enhancing the co-ordination of the different components of the criminal justice system; the second was that the general public should not be divorced from the determination of a penalty structure (this determination should at least not contradict public notions of the relative seriousness of different offences).

2.2 Surveys

Three groups of criminal justice professionals expressed detailed opinions on sentencing guidelines. Not surprisingly, these were judges, defence and Crown counsel. All three groups acknowledged the reality of the problem of unwarranted sentencing variation. As a background to their opinion on guidelines, we shall refer once again to their perception of disparity. Seventy-four percent of the judges who answered a Commission questionnaire expressed the opinion that there is at least a fair amount of unwarranted disparity from judge to judge (Research #6). Fifty-eight percent of the judges also believed that there was some unwarranted variation from province to province (8% said there was a lot (Research #6). Crown and defence counsel were also surveyed and the Commission received over 700 responses from across Canada. Forty-one percent of Crown counsel and 40% of defence counsel were of the opinion that there was a *great deal* of unwarranted variation across Canada (Research #5).

In its surveys, the Commission asked what kind of guidance was more likely to reduce unwarranted disparity. In formulating this question, the Commission provided the respondents with a list of seven models of guidelines and asked them to indicate their response for each of these models. The seven options ranged from the present system of guidance through judgments issued by Courts of Appeal, to some form of mathematical equation.¹ The option which received the most support from the judges was the *present* system of guidance from the Courts of Appeal (46% of the judges answered that this was a useful way to deal with unwarranted disparity, while 27% said that it was the best way (Research #6). The present system of appellate guidance was explicitly distinguished from another model of guidance, which was described as guideline judgments issued by the Courts of Appeal. In giving more support to the present system of guidance than to guideline judgments, it is clear that

the judges who responded to the Commission's survey favoured the maintenance of the *status quo*.

The tendency to retain the *status quo* was also very strong among Crown and defence counsel. The responses to the questionnaire were classified into three groups: full-time Crown counsel (355), full-time defence counsel (342) and a third mixed group of 62 respondents who act as part-time Crown counsel, whether or not they also act as defence counsel. The present system of guidance was the option most favoured by the lawyers belonging to this third group. It was a close second choice for defence lawyers (their most favoured option was supported by 37%, while the present *status quo* enjoyed the support of 35%). The present system of guidance was also chosen second by Crown attorneys.

These results are difficult to assess. On the one hand the problem of disparity is acknowledged to be real and on the other hand there is marked reluctance to change the system which generates such disparity.

Judges and those lawyers who act as part-time Crown counsel were consistent in selecting Courts of Appeal "guideline judgments" as their second most favoured model (Research #6 and Research #5). This is the guideline model which is closest to the present system. Sixty-five percent of the Crown attorneys favoured Court of Appeal guideline judgments to reduce disparity. As we previously mentioned, this was the model which received the greatest support from Crown counsel. The defence lawyers gave more support to a statement of goals and principles of sentencing than to guideline judgments from Courts of Appeal (37% v. 27%; Research #5; table 13). The more salient feature of the defence lawyers' general attitude is not, however, their relative support for a statement of goals and principles. It is the fact that, unlike judges, Crown counsel and part-time Crown counsel, defence counsel do not strongly support either the present system or any remedy to disparity that would imply changing the present system. Seventy-three percent of judges favour the present system and 59% appear to believe that guideline judgments from the Courts of Appeal would reduce disparity. As previously mentioned, 64% of Crown counsel also favour guideline judgments. The part-time Crown counsel (the mixed group) give their majority support (53%; Research #5; table 13) to the *status quo*. The defence lawyers' support of any option — including the present system of guidance from the Courts of Appeal — while it is in five instances out of seven much below the 30% mark, never reaches above 37%. This means that there is always a majority of at least 63% of defence lawyers who do not favour the present system nor any proposed measure to ameliorate the situation. Again, this result is difficult to interpret, particularly in view of the fact that 40% of the defence lawyers surveyed by the Commission voiced the opinion that there is a great deal of unwarranted disparity across Canada.

Given the overall cautiousness of judges and lawyers regarding changes in the sentencing process, it is surprising that a system of presumptive sentences, which is perceived as a novelty in Canada, received as much support as it did. This is all the more surprising, since presumptive sentences were described in

our questionnaire as *legislated* presumptive sentences – the most rigid form of presumptive sentences. As we shall see later in this chapter, although the establishment of the presumptive sentencing guidelines recommended by this Commission will be authorized by law, the guidelines themselves will not be contained in legislation. One judge in four (24%) answered that presumptive sentences were a useful way to deal with unwarranted disparity in sentencing (26% of the judges were even in favour of a sentencing grid) (Research #6). Likewise, 27% of Crown counsel were favourable to presumptive sentences. These figures do not belittle the fact that the majority of judges and Crown attorneys have not expressed support for presumptive sentencing. It is, however, worth noting that close to three times as many judges and Crown attorneys than defense lawyers support presumptive sentences. Defense lawyers oppose presumptive sentencing by an overwhelming majority of 91%. The situation may be different with regard to judges and Crown attorneys. Students of social and organization changes have noted that acceptance of a novel idea by 25% of the members of a group was an auspicious starting point.²

2.3 Judicial Comments

The questionnaire sent to judges invited their comments on sentencing issues. Judges from across Canada responded to this invitation and many included thoughtful comments in their responses. There were recurring themes in these comments. Three of these themes have been singled out for a brief discussion because of their frequency and their immediate relationship to the issue of sentencing guidelines.

2.3.1 Sentencing As an Art

It was often asserted that sentencing is an art. As an art rather than as science, it was stressed that sentencing is a process which cannot be reduced to the mechanical application of a few rigid formulas. There can be no quarrel with this point. However, if stretched too far, this analogy with art could generate significant misunderstandings.

A work of art requires time and assiduousness. It would be a misunderstanding to believe that every sentence is the outcome of a lengthy and painstaking process of deliberation. Although this certainly may be true of epochal sentencing decisions and may also be true of many others³, it would be misleading to assert that such weighty deliberations are more the rule than the exception. The courts are overburdened. Studies taking into account all cases disposed of by the courts have shown that the average time spent by a convicted offender before a sentencing judge is quite short⁴. The consequences of the considerable magnitude of the courts' caseload can be further illustrated. In Canada, a pre-sentence report is produced only when ordered by the court. A Quebec study of armed robbery found that sentencing judges requested these reports in only a small proportion of cases⁵. This finding is significant since armed robbery is a serious offence which is likely to be severely punished.

Accordingly, one would expect that the probability that judges would ask for a pre-sentence report would be far greater in cases of armed robbery. Even in these cases requests for pre-sentence reports were infrequent.

These facts construct a picture of sentencing which is closer to the expeditious imposition of a pre-determined tariff or going rate than to the patient exercise of an art. This remark is not intended as a denial that sentencing in some respects resembles an art. It is only aimed at the abuse of this analogy as a justification for the view that the sentencing process is not amenable to structure.

2.3.2 Sentencing as Problem-Solving

It was often claimed in the judges' comments that all regional disparity may be justified by the differences between crime problems which are experienced from one community to another. For example, it was said that the use of firearms in rural and remote communities is different from urban violence. That much can be granted. However, what is really at issue is whether sentencing can, in fact, provide a lasting solution to these various problems. That can be questioned.

The arguments presented in Chapter 6 of this report support the assertion made in *The Criminal Law in Canadian Society* (Canada, 1982) that sentencing alone cannot be expected to eradicate nor even to reduce significantly the occurrence of crime. In that same publication the argument was also made that the effects of sentencing on crime rates are of a general nature and do not operate as a specific antidote to a particular crime problem (e.g., impaired driving in a rural community). To view sentencing as a problem-solving activity conflicts to a certain extent with claiming that it is an art. Solving problems requires exact knowledge and information. Consequently, in its attempt to resolve social or individual problems, sentencing would be drawn closer to being a science than to being an art. Although many judges asserted that sentencing is more of a skill than a science, they were almost unanimous in requesting better information than they already possess to fulfill their task. The sentencing process rests on judicial wisdom. Although it cannot be denied that providing a penalty of any given size does have a general deterrent effect on members of society, sentencing should not be confused with a precision tool that can be finely-tuned to produce specific effects.

2.3.3 Sentencing as Personalized Care

Another statement that appears in numerous comments from judges is that no two offenders are alike. It would follow that if one were to develop sentencing guidelines that would introduce a greater degree of uniformity in the process, they would result in an even greater inequity than the disparity which presently exists. This line of reasoning ultimately leads to the assertion that the sentence ought to fit the offender rather than the offence.⁶

The question is not whether every convicted offender is an individual, different from any other, but to what extent every offender ought to be considered different from any other *for the purpose of sentencing*. Here, principles of fundamental justice come into play. No sentence can be legally imposed on a person unless that person has been convicted of a criminal offence. The object of a conviction is what a person *did* and not who that person *is*. There are limits to what the courts can rightfully consider in imposing a sentence. As persons, all offenders are different. As offenders they share common traits – such as, for example, having committed the same offence – which should be the main concern of the courts. Clearly, the whole person of the offender is not surrendered to the Court once he or she has been convicted of a criminal offence. The *Charter of Rights and Freedoms* forbids that persons be discriminated against (i.e. treated differently) on the grounds of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

Even if the approach to sentencing were to try to make the sentence fit the individual rather than the offence, there are structural limitations inherent in our current process that would subvert this approach. For example, most offenders enter a guilty plea through plea negotiations. The case coming before the judge may be unique, but at least part of this uniqueness is the by-product of the criminal law, as it operates in the pre-sentencing stages. This pre-determination of the cases sets a limit on the possibility of really individualizing the sentence. The offender appearing before the judge may have already been stripped of a part of his legal persona (e.g., the charges laid against him or her may have a distant relationship to the offence which has been originally committed). Taken at face value, the claim that every offender is different from any other would make sentencing impossible because the array of criminal sanctions cannot match the scope of human diversity. Measures such as tariffs, starting points and benchmarks are already in use to introduce some order in the application of the criminal law, in spite of the multiplicity of cases which it must dispatch. For example guideline judgments issued by the Alberta and Nova Scotia Courts of Appeal in armed robbery cases focus more upon offences than offenders. These practices can be built upon to yield principled sentencing guidelines.

3. Different Models of Sentencing Guidelines

Originally, the term “sentencing guideline” was defined quite broadly as any remedy against unwarranted sentencing disparity. Sentencing guidelines have since come to fulfill needs other than promoting equity. For the sake of a thorough enumeration of guidelines models, we shall begin with the broad definition quoted above. As responses to disparity, the different models of sentencing guidelines fall into three categories: statutory regulation; judicial self-regulation and extra-judicial regulation.⁷

3.1 Statutory Regulation

The word “regulation” is not understood here as in administrative law and does not refer to a special kind of rule. Statutory regulation refers to sentencing guidelines which are embodied in the criminal law. Legislated guidelines can take different forms.

3.1.1 Mandatory Sentencing

Mandatory sentencing refers to the mandatory incarceration of certain offenders. The minimum terms of imprisonment to be served are set by law. These mandatory minimum terms apply only to select crimes and can be further qualified by clauses providing legal exception to the statutes (“special reason” and “unjust to do so” exceptions, or stated exceptions and prohibited ranges of sentences in the case of certain categories of offenders – most frequently, young offenders). The U.S. states of Michigan, Massachusetts, New York and California have all enacted legislation making all or part of sentencing mandatory.

3.1.2 Statutory Restrictions on Incarceration

Several English statutes specify that a particular type of sentence (most often imprisonment) shall be imposed on certain types of offenders (i.e. young offenders) only if “no other method (is) appropriate”.

3.1.3 Flat Time

In a flat sentencing scheme, the judge may choose between imprisonment and some other type of punishment but the length (the time actually served) of any carceral sentence is prescribed in the legislation. According to this scheme, probation is retained as an initial alternative to incarceration but parole is abolished. The reduction of a term of imprisonment for “good time” served is determined according to the legislation, leaving no place for discretion in the administration of the sentence.

3.1.4 Normal Maximum Sentences

In Great Britain, the Advisory Council on the Penal System (1978) proposed that the normal maximum sentence of incarceration for each offence be set at a level which would include 90% of sentences currently imposed. Far from applying to the worst possible case, these normal maximum sentences are designed to fit the most frequent variations of the same type of offence. These normal maxima could be embodied in law, although the Advisory Council recommended that such a system be implemented at first by the judges themselves.

3.2 Judicial Self-Regulation

Appellate review of the fitness of a sentence is the system of regulation which has been in operation in Canada since at least 1921. Judicial self-regulation can take several other forms.

3.2.1 Advisory Sentencing Guidelines

Sentencing guidelines have been the object of widely differing interpretations over the last 20 years. Mandatory sentencing, which began in 1973 in the state of New York, was succeeded by purely advisory sentencing guidelines. The initiators of advisory guidelines were convinced that sentencing disparity was wholly attributable to a lack of judicial information on sentencing practices. Not knowing what the other judges were doing, sentencing judges worked in isolation from one another and this resulted in sentencing disparity. The solution rested in guidelines, which were conceived as information on sentencing practices that would in themselves generate compliance with current trends. Wilkins et al. (1978:4) define these sentencing guidelines:

“Webster defines the term ‘guideline’ as an ‘indication or outline... of policy or conduct.’ The term ‘guideline,’ as we use it, also refers to a *system of data* which functions as a tool in assisting decision-makers in arriving at individual and policy determinations.” (Our emphasis)

Basically, advisory guidelines consisted of highly structured information on the current trends in sentencing (e.g., this information was in certain cases presented in the format of a grid). It was believed that once they were aware of these trends, judges would follow them without drastically modifying them. With the passage of time, it was thought that these trends would slowly and naturally evolve.

3.2.2 Appellate Review

Appellate review can be understood in several ways. It can entail reviewing the fitness of a particular sentence or providing guidance for all instances of a particular offence. It can also provide broader guidance which goes beyond a particular offence, where, for example, sexual assaults are divided into several categories. Guideline judgments differentiate variants of a particular offence and map these variations into a proposed sentencing structure. In Great Britain the Court of Appeal has issued a number of guideline judgments which go beyond the particular case at hand to issue a policy for the sentencing of a particular offence. Instances of these guideline judgments, while still few are *R. v. Roberts*⁸ for sentencing in rape cases and *R. v. Aramah*⁹ for sentencing in drug cases. Of perhaps even greater consequence are the policy-setting judgments in *R. v. Begum Bibi*¹⁰ and *R. v. Clarke*¹¹. Canadian Courts of Appeal have also begun to issue guideline judgments – see, for example, *R. v. Johnas*¹² and *R. v. Sandercock*¹³. (For a more detailed discussion of guideline judgments see Chapter 3).

3.2.3 Sentencing Councils

It has been proposed that sentencing by one judge be replaced by collective decision-making. Such sentencing councils would be comprised of three judges. It has also been suggested that laypersons be included among the members of these councils. However interesting in theory, this option may be quickly discarded on the grounds that it lacks feasibility. It is unlikely, in times of economic restraint, that a recommendation to use three judges to perform the sentencing tasks of one – with no real guarantee that the result will be better – will meet with much enthusiasm. Hence, the provisory dismissal of the sentencing council. The same conclusion applies *a fortiori* to enlarged sentencing councils on which laypersons serve. Furthermore, research in this area tends to negate any tangible advantage to sentencing by panels as opposed to individual judges.

3.2.4 Normal Maximum Sentences

This is the approach described in 3.1.4. Instead of being embodied in law, the system of normal maximum penalties would be operated by sentencing judges.

3.3 Extra-Judicial Regulation

There is only one model which falls under this heading. It is that of sentencing guidelines. The expression “extra-judicial regulation” under which sentencing guidelines are classified, only refers to the fact that in most instances sentencing guidelines of the kind that we have been discussing have been formulated by specially-appointed independent bodies (normally sentencing commissions). Needless to say, judges constitute the majority of members on these bodies. Ashworth (1983; 72 and 80) classifies guidelines both among the forms of judicial self-regulation and forms of statutory or other extra-judicial regulation. Six of the nine members of the Canadian Sentencing Commission are judges.

We began this enumeration of the responses to disparity by assigning a broad definition to the term “sentencing guidelines” as it appears in the Commission’s mandate. There exists, however, a narrower, more technical definition which describes a sentencing guidelines model adopted by no fewer than 17 U.S. states.¹⁴ The U.S. Federal Government has appointed a Sentencing Guidelines Commission and its final report is due in April of 1987.

One should make a distinction between what is the substance of a set of guidelines and what is accessory to it. The substance of sentencing guidelines consists in the identification of what type of guidance is needed and in providing it. It also rests in the notion of a presumptive sentence. Although it has been the focus of much attention and is by no means insignificant, the format of guidelines is more of an accessory.

3.3.1 The Content of a Set of Sentencing Guidelines

The components of a set of guidelines are the embodiment of a sentencing rationale which must be articulated before further developing the guidelines.

It has been often repeated that assisting the judge in whether to impose a sentence of imprisonment or to impose a community sanction is the crucial function of sentencing guidelines. This function can be performed with various degrees of explicitness. In most U.S. jurisdictions, Sentencing Guidelines Commissions are satisfied when they have drawn the “in/out line” and they stop short of specifying what the meaning of either “in” or “out” is, except that “in” implies the use of custody and “out” involves the imposition of a community sanction. Guidance as to which kind of community sanction is appropriate could be very useful.

In contrast to community sanctions, custodial sanctions are further determined by sentencing guidelines. Guidelines specify a numerical range – usually in terms of months of custody – which is proportionate to the seriousness of an offence, for which there exists a presumption of incarceration.

Sentencing guidelines also take into account the size of the prison population. In certain U.S. jurisdictions, the Sentencing Guidelines Commissions were expressly directed to set the custodial ranges in a way that would stabilize the growth of prison populations.

Past experience has shown that there was a crucial need to co-ordinate the exercise of prosecutorial discretion with the intended purpose of the sentencing guidelines. To date there has been only one attempt to develop guidelines for prosecuting attorneys.¹⁵

3.3.2 Presumptive Sentences

The notion of a presumptive sentence is at the core of sentencing guidelines. Presumptive sentencing incorporates two key requirements. Guidelines should be sufficiently prescriptive to influence sentencing practice; they must also be flexible in order not to unduly constrain sentencing judges.

To be truly prescriptive, sentencing guidelines must be grounded in legislation although they need not be incorporated therein. However, their legal basis must be such that it allows departures from the guidelines and facilitates rather than impedes the process of updating the guidelines. There are different ways to articulate this middle ground between formal criminal statutes, which are too constraining and very cumbersome to amend, and purely advisory guidelines which have no real effect on sentencing practice. The Commission will make its own recommendation on this issue and the legal status of the proposed guidelines will be discussed in detail.

The issue of departures from the guidelines has so far received a standard solution. The judge may depart from the guidelines, but must provide reasons to justify the departure. A non-exhaustive list of aggravating and mitigating factors is usually appended to the guidelines and they provide special grounds for departure. Some guidelines also stipulate that certain factors – such as the offender's race, sex and religion – cannot be used to justify a departure from the guidelines.

As previously noted, the legal status of the guidelines must be flexible enough to allow their on-going review and updating in an efficient and timely manner. Reviewing and updating the guidelines requires the implementation of reliable information systems which monitor sentencing trends and systematically feed data back into the process of updating the guidelines.

3.3.3 Guideline Formats

Sentencing guidelines can be embodied in different formats. Formats may be classified in two categories: guidance by words and guidance by numbers. Guidance by words can take the form of a declaration of the purpose and principles of sentencing. The in/out line can also be drawn by using words to assign a presumptive sanction to the offences in the *Code*.

The numerical formats are more numerous.

a) Benchmarks:

The use of benchmarks was proposed in the submission from the Law Reform Commission of Canada (1985). Benchmarks are described thus:

A “benchmark” sentence or disposition indicates the norm in the “usual” case. It would be an indication of the usual disposition in the “normal” case. Because individual circumstances vary, it should be possible for a court to depart from the benchmark, but in order to maintain a rough equality among cases of roughly equal seriousness such departure should be limited to a 10% or 15% variation either way depending on aggravating or mitigating circumstances. Exceptional cases, all would agree, cannot be dealt with by general rules or “benchmarks”. Accordingly, for a limited number of cases where the circumstances are “clearly compelling” for a departure which is greater than 15% from the benchmark, the court should be able to impose a sentence, according to the principles stated, giving reasons, and subject to appeal by either Crown or defence counsel.

b) Two-dimensional matrix:

The most frequently used format for extra-judicial sentencing guidelines is the two-dimensional matrix. This type of matrix usually cross-tabulates the seriousness of the offence and the prior record of the offender. According to the just deserts theory, seriousness is a compound of the quantum of harm and the degree of culpability. Only harm is taken into account in this matrix. Appendix J is a reproduction of the two-dimensional matrix or sentencing grid used in the state of Minnesota. Its use is similar to road mileage charts, which indicate the distance between towns at points on a grid where the row corresponding to one

town intersects the column corresponding to another. Instead of distances, one finds dispositions (or lengths of sentences) in the different “cells” of a sentencing matrix. This format has frequently been selected because it is quick and simple. The procedure for departing from the guidelines is similar to the one described in relation to benchmarks. In Canada, Vining (1979) has advocated the use of matrices. Other formats are utilized in the U.S.

c) Sequential guidelines:

Instead of travelling through a grid, one calculates the sentence by adding up sequentially the result of different computing operations.

d) Formula guidelines:

The disposition is determined by a mathematical formula, which assigns different numerical weights to various factors (e.g., seriousness of offence, prior convictions, extent of guilt or injury inflicted).

e) Sentencing manuals:

These sentencing manuals use the preceding formats, but are more highly particularized (specific guidelines are developed for several variations of the same offence and a large number of factors are taken into account).

f) Computer-assisted guidelines:

These entail the use of a mathematical equation to reduce the complexity of the sentencing task when using highly differentiated sentencing manuals. A score is assigned to each relevant variable and the computer combines these scores according to a formula derived from the guidelines.

4. The Choice of a Sentencing Guidelines Model

Reviewing the advantages and disadvantages of all these models would be time-consuming and tedious. It is also unnecessary. We now propose to discuss a set of conditions that must be satisfied by a model to be acceptable for sentencing in Canada. After listing these criteria we shall find that, with few exceptions, all previous models are basically inadequate and that a new alternative must be developed.

4.1 Conditions of Adequacy

The conditions which have to be met before a model may be considered adequate can be classified in three categories: structural conditions, contextual conditions and consistency conditions.

4.1.1 Structural Conditions

a) The policy level and the case by case level

Sentencing guidelines should be developed by a body which is appropriate to policy-making. Although it may seem trivial at first, it is of paramount

importance to make a distinction between the policy-making level and the translation of policy into practice on a case by case level. The word “translation” is used here deliberately. Not only is policy never mechanically implemented, but often it is reformulated as it is operationalized. This is particularly true in the field of criminal justice, where no one policy can encompass the variety of cases. Policy must be adapted to accommodate unforeseen problems; sometimes, it must even be violated to solve exceptional cases. It may not be desirable that the policy-making body and the body which reviews departures from the policy be the same. If they were one body, the instigators of the policy may have to condone departures from their own guidelines when these departures would appear justified. This often leads to confusion and to conflict.

The difference between the policy-making level and the case by case implementation of policy can be further illustrated with regard to information systems. The kind of information needed to determine policy – broad numerical figures on major trends – is to be sharply contrasted with the type of information which is relevant to the sentencing judge in solving particular cases, and, particularly, in reviewing cases. Whereas the latter must be detailed and sensitive to differences between cases, the former is general and aims at identifying the common features of a vast number of cases.

The difference between policy-making and solving particular cases is especially acute with regard to the issue of accountability. Policy-makers should account to Parliament, particularly when they issue guidelines on penal sanctions which imply depriving persons of their freedom.

b) A clear notion of departure

Policy is the determination of a specific course of action which should be commonly followed by several actors in a process. Thus, it must be general enough to encompass a majority of cases, while being precise enough to leave no ambiguity as to whether it is complied with or departed from. Guidelines, which allow for controversy in deciding whether they are actually followed cannot be said to be really directive and it is doubtful whether they may legitimately be called a policy.

c) Updating potential

There may be many reasons for supplementing the criminal law with sentencing guidelines. One reason is that the law sets only maximum penalties which are so high as to allow for disparate sentencing practices. Another important reason is that, whereas sentencing practice is constantly evolving, legislation is notoriously slow to change. There ought to be a set of flexible rules which guide sentencing practice but which at the same time are also responsive to that practice and to its transformations. This response is provided through a process of updating the guidelines. Updating requirements are so crucial that if guidelines were developed following a model that did not readily meet these requirements they would be of little use.

There is a feature of updating guidelines which is essential. The penalties assigned to offences are all interconnected and taken together they form a

structured whole. Updating a penalty structure is a process that requires taking into account the relationships between the different sanctions. It should also imply an assessment of the impact of the entire structure, as modified, on the size of the prison population. In other words, a piecemeal approach to updating guidelines would defeat the purpose of having guidelines in the first place.

4.1.2 Contextual Conditions

Contextual conditions refer to specific features of sentencing in the Canadian context, which must be given consideration in developing a model of sentencing guidelines. We shall single out what we believe to be the most important features.

a) Political reality:

Perhaps the most important feature to take into account in developing a model of sentencing guidelines acceptable to the Canadian context is the feature which sets Canada apart from other jurisdictions. Canadian criminal law is unique in that although the law itself, as written in the *Code* or other statutes, is under federal jurisdiction, the administration of criminal law is under the jurisdiction of the provinces.

b) Determinate sentencing:

As evidenced by the history of problems surrounding the legislation on habitual and dangerous offenders, Canada never fully embraced indeterminate sentencing. Consequently, there is no real need to resort to strong numerical constraints to modify sentencing habits.

c) Appellate review:

We will not dwell at length on this salient feature of sentencing in the Canadian context. It has been discussed in detail in Chapter 3. There is, however, a comment which is relevant to the present discussion. The right to appeal sentences is less limited in Canada than in several other countries. For instance, only the defence can appeal a sentence in England; both the defence and the prosecution can appeal sentences in Canada. The United States, on the other hand, do not have a strong tradition of appellate review of sentencing (there was no ground to appeal an indeterminate sentence). This is reflected in the fact that in some U.S. jurisdictions which have adopted sentencing guidelines, it is only the departures from the guidelines which can be the object of appellate review. This is unnecessarily narrow. An offender could rightfully claim that his case was exceptional and that the presumptive sentence provided by the sentencing guidelines should not have been imposed. This Commission sees no reason to change the Canadian tradition in this regard and to restrict in any way the right to appeal a sentence.

d) Over-reliance on incarceration:

Not all features are as positive as the two preceding ones. Canada's rate of imprisonment is 108 adults per 100,000 total (adults and non-adults) population which puts Canada in sixth place among 18 countries whose rates of

incarceration are cited in the most recent edition of *Basic Facts About Corrections in Canada* (Correctional Service of Canada, 1986; 9-10). Actually, of the 18 countries cited, only the United States and Turkey have a significantly higher rate of imprisonment than Canada. The countries in third, fourth and fifth place – Fiji, Malaysia and Austria – respectively incarcerate 112.7, 110.2 and 109 adults per 100,000 total population. Those rates are not substantially different from the Canadian rate of 108.

The over-reliance on incarceration in Canada has been a focus of criticism at least since the Fauteux Report (1956), which declared that custodial sentences were much longer here than in England. Even if it is not as severe as in the United States, Canada now has a problem of prison overcrowding. One consequence of prison overcrowding, in addition to prison riots, is that some custodial sentences are simply not served in custody (in particular, intermittent custodial sentences). There is no available space and no public or political will to spend taxes on building more prisons. Few things undermine the criminal law as much as the information that sentences of imprisonment are imposed but time is never served in custody.

e) Lack of information and feed-back:

The point that no sentencing data have been published since 1978 by Statistics Canada, despite the creation of the Canadian Centre for Justice Statistics, has been made elsewhere in this report and we shall limit ourselves to a reminder that this problem still exists and that it requires a solution if the sentencing process is not to go on operating in darkness. This solution is not independent of the implementation of sentencing guidelines, which necessitates the establishment of reliable information systems.

f) Acceptability:

No reform of sentencing can be successfully achieved against the explicit will of sentencing judges, who will share the prime responsibility for its implementation. According to the Commission's research on the opinion of judges on the issues implied by its terms of reference, Canadian judges decisively reject two things: mandatory sentencing, which is wholly determined by criminal statutes; and, mathematical sentencing, as it would be performed by the application of numerical formulas and equations and by comparing the computation of the score of offenders on different dimensions (e.g., prior criminal history).

g) Previous and current Canadian thought on sentencing:

There is one last feature, which is difficult to name, although it is easy enough to describe. There has been, since the 1969 Ouimet Committee Report, a significant amount of thought given to sentencing in Canada. In particular, the Law Reform Commission of Canada has issued stimulating reports on sentencing and its implications. It is important therefore that this Commission build upon these efforts and, most importantly, that it not settle for solutions which are weaker and less ambitious than what has been repeatedly advocated in Canada for the past twenty years. Hence, to take an example that will be

elaborated upon later in this chapter, it has been recommended several times since the Ouimet Report that written justifications be given for the imposition of a custodial sentence. This is the sort of recommendation which should be integrated into the content of a model of sentencing guidelines.

4.1.3 Consistency Conditions

It has been repeatedly stressed throughout this report that the Commission's recommendations resulted from an integrated approach to the problems it had to solve. According to this integrated approach, the model of sentencing guidelines which is proposed by the Commission must be consistent with the other reforms which it recommends. Needless to say, the model must also be consistent with the Commission's terms of reference. There is one condition of consistency which is absolutely crucial. As previously mentioned, the guidelines must have the ability to offset, through their influence on sentencing practice, the potential increase in prison population which might result from the curtailment of early release. In order to avoid any such increase it will now be necessary for judges to consider that under the Commission's proposals, the time actually spent in custody by offenders will much more closely approximate the length of the sentence initially imposed (i.e. a minimum of 75%). Adjustments in the length of sentence imposed should be made to offset the greater proportion of time spent in custody. In this regard it must be emphasized that according to impact studies undertaken for the Commission, the federal prison population would increase by 20% after only two years of implementation of the Commission's proposals on early release, if sentences of imprisonment were to remain at their current level. Hence, the requirement that adjustments to the lengths of sentences be made to coincide with the abolition of full parole. The implementation of guidelines, however, best ensures that this takes place.

4.2 An Assessment of the Different Models of Guidelines

Models of sentencing guidelines which have been previously described will not be assessed in detail. The assessment of models which follows will be brief. Models can be disqualified for not meeting one or more of the conditions of adequacy stipulated above. There will be a thorough discussion of sentencing grids, although this model is also rejected by the Commission. Since the notion of sentencing guidelines has come to be associated with the development of a sentencing grid (see Appendix J for the sentencing grid used in the state of Minnesota), it is important to dispel any misunderstanding which might result from confusing the sentencing guidelines recommended by the Commission with a sentencing grid. The benchmark approach, which is advocated by the submission from the Law Reform Commission of Canada will also be discussed, because it represents the only detailed outline of sentencing guidelines which was submitted to the Commission.

4.2.1 Mandatory Sentencing

All the options that were listed under the heading of statutory regulation imply that sentencing guidelines be enshrined in the criminal law; some of

these options even imply that numerical guidelines be embodied in the criminal law. As a result of their rigidity, any of these options would meet with extreme resistance from judges as well as from most professionals involved in the administration of the criminal law. Their reservations would be justified. Wherever mandatory or flat time sentencing has been implemented, these measures have resulted in a large increase in the use of incarceration and in a corresponding increase in the size of prison populations. They are inconsistent with the principle of restraint which has been advocated throughout this report and which is part of the Declaration of Purpose and Principles of Sentencing recommended by the Commission. Mandatory sentencing, which implies an extension of mandatory minimum penalties to the whole structure of sanctions, is in absolute opposition to the Commission's position on minimum penalties. It also generates inequities in sentencing.

Although their use was recommended by the 1978 Report of the Advisory Council on the Penal System, "normal maxima" met with no acceptance in Great Britain. Whatever its merits, this approach is of little use to this Commission since we have already reviewed all maximum penalties and set them at levels which are closer to current sentencing practice in Canada. There would be no point in superseding the new maximum penalties with normal maxima.

As for statutory restrictions on the use of incarceration, they are mostly relevant to young offenders, who in Canada are governed by the Young Offenders Act, which is outside the scope of the Commission's inquiry. One restriction on the use of incarceration – the use of incarceration solely for the purposes of rehabilitation – is an integral part of the Commission's Declaration of Purpose and Principles of Sentencing.

The Commission concludes that no form of guidance described in section 3.1 of this chapter – under the heading of statutory regulation – is adequate for the purpose of developing sentencing guidelines.

4.2.2 Sentencing Guideline Judgments

If we except sentencing councils and normal maximum penalties submitted on an advisory basis, judicial self-regulation can be seen to take two fundamental forms: advisory sentencing guidelines issued by an independent body and guideline judgments developed by the Courts of Appeal. Only the issue of guideline judgments will now be addressed. Whether guidelines should be advisory or presumptive will be discussed when the Commission's recommendations on sentencing guidelines are presented.

Whether or not Courts of Appeal could be relied on to develop sentencing guidelines was the object of a thorough discussion in Chapter 3. The conclusion was reached that for reasons of structure and tradition, Courts of Appeal are not in a position to single-handedly develop and update a comprehensive set of sentencing guidelines. The arguments which led to this conclusion will not be

repeated here. However, the capacity of the Courts of Appeal to meet some of the most important conditions of adequacy which were previously stipulated will be briefly reviewed.

The first condition related to the necessity of maintaining a balance between national guidelines and regional standards. Located across the country, in ten provinces, Courts of Appeal are more apt to uphold regional and community standards than to develop consistent guidelines for all of Canada.

Given the minute proportion of sentences that are appealed, the opportunity for Courts of Appeal to deal with the wide range of cases occurring in daily practice is extremely restricted. The vast majority of cases are never subjected to appellate review. Accordingly the Court of Appeal can in reality seldom provide guidance to the trial courts. Even serious cases giving rise to crucial public issues may never reach a Court of Appeal due to the plea bargaining process. On account of their reactive nature they are more suited to evaluate the applicability of particular sentences rather than provide a comprehensive set of guidelines.

There are other objections to vesting all authority to make sentencing policy in Courts of Appeal. First of all, they are not accountable to Parliament. Second, they lack the necessary resources and experience to collect and process the sentencing data which sentencing policy must take into account. Furthermore, the courts would operate on two levels: first, on the level of policy-making and second, of reviewing particular cases. Consequently, Courts of Appeal would either feel bound by their own rules (and be less sensitive to the justifications for departing from them) or, alternatively, if they upheld frequent departures from their guidelines, it might be construed as indicating that the rule they formulated is inadequate.

Research on appellate jurisprudence has shown that notions of both compliance with guidelines issued by the Court of Appeal and departures from these guidelines are shrouded in ambiguity. *R. v. Basha et. al.* (1979), 23 Nfld. & P.E.I.R. 286 (Nfld. C.A.) is particularly significant in this regard: the judgment of the trial judge was reversed by the Court of Appeal for having given too much weight to guidance from the Courts of Appeal and, apparently, not enough to the circumstances of the individual case.

The absence of a mechanism to collect sentencing data is evidence of the fact that there is no inherent relationship between the appellate court process and the development of a sentencing information system. In contrast, it is literally unthinkable that such an inherent relationship would not exist between sentencing guidelines, as developed by a sentencing commission, and the establishment of a reliable sentencing information system.

The abolition of parole and the curtailment of the proportion of the sentence that may be affected by remission credits makes the drawing of the in/out line a vital issue. Unfortunately, this is precisely the type of guidance

which has not been adequately provided by the Courts of Appeal. As was discussed in Chapter 3, Courts of Appeal in issuing guideline judgments, currently operate within the framework of a general presumption of incarceration. Although this could change, it is extremely doubtful that for all offences the change could occur in time to offset the impact on prison capacity of our proposals regarding the proportion of sentences of imprisonment that are served in custody. If the Commission's recommendations on the reform of early release programs are accepted, these reforms will be effected by the enactment of legislation. Once a law has been passed, it may come into force *immediately*. The development of guideline judgments by Courts of Appeal is, in contrast, a process that necessarily extends over a long period of time. Unless the implementation of the Commission's recommendations on early release were postponed for this lengthy period, half of the package would be in force while the other half (the development of sentencing guidelines) would have barely started.

4.2.3 Sentencing Guidelines

It would appear that the only alternative left is the development of sentencing guidelines by an independent body. In section 3.3, entitled Extra-Judicial Regulation, a distinction was drawn between the content of a set of sentencing guidelines, the type of constraints which they imply (e.g., presumptive sentences) and their format. At this point in the discussion, the Commission can be said to be committed to developing the kind of guidance which has been described in very general terms as forming the content of a comprehensive set of sentencing guidelines. The Commission must also determine to what extent its guidelines should be constraining.

The Commission is however in no way committed to adopting a specific numerical format. Particularly, the Commission's belief that guideline judgments from Courts of Appeal are not a fully adequate model of guidance does not compel it to recommend the adoption of a sentencing grid or anything equivalent to it.

Clearly, the guidelines proposed by the Commission are not in a grid format. There is however, more to a grid than crossed lines on a page of paper. The features embodied in the use of a sentencing grid, as a model for guidelines, will now be reviewed. This discussion is bound to be relatively technical. However, avoiding it may have dire consequences for the proper understanding of the Commission's recommendations on sentencing guidelines.

Several U.S. jurisdictions have adopted a sentencing grid. The most widely commented-upon sentencing guidelines which use this model are the Minnesota sentencing guidelines. Basically, these sentencing guidelines are a set of rules applied first to compute an offender's score – based primarily on the prior criminal record – and then to determine the level of seriousness of the offence. The end product of these two operations is supposed to guide the judge in making two decisions believed to be crucial to the determination of sentence; to

decide whether or not to incarcerate the convicted offender and to decide on the length of incarceration.

We have reproduced the Minnesota sentencing grid in Appendix J. Those offenders whose presumptive sentence is indicated to the left of and above the boldface black line across the grid are not to be incarcerated; when the sentence has to be read from a cell to the right of and below the in/out line, the offender is to be sent to prison. The numbers appearing at the bottom of each cell set the presumptive range of a custodial sentence; the number which is printed in the middle of each cell indicates what the sentence should be in normal circumstances. Admittedly, this is a sketchy presentation. Additional features of the model will be introduced in the course of our discussion.

Here is a non-exhaustive list of differences between the Minnesota approach to sentencing guidelines and the one taken by this Commission:

a) The Minnesota guidelines only deal with felonies

U.S. criminal law distinguishes between felonies and misdemeanours, the former being the most serious offences. The Canadian procedural distinction between indictable and summary conviction offences roughly approximates this distinction. The Commission's guidelines refer to every offence prescribed in the *Criminal Code*, *Narcotic Control Act*, and *Food and Drugs Act* (Parts III, IV). Hence, all less serious offences that, in fact, comprise the bulk of the court's caseload and often receive sentences of imprisonment are included. Copied in Canada, the Minnesota guidelines would apply only to the sentencing of indictable offences.

b) The systematic use of suspended sentences

It may be thought that restricting the guidelines to apply to felonies is an accessory feature of the Minnesota model and that misdemeanours could easily be added to the grid. This is a mistake. All offenders who, according to the guidelines, should not be incarcerated actually receive a *suspended custodial sentence*. All presumptive sentences indicated in the grid refer to a term of custody. The only way afforded by the Minnesota Sentencing Guidelines to keep a felon out of prison is to suspend ("to stay") the application of his prison sentence. The suspended sentence can eventually be applied if the offender breaches the conditions of his suspended ("stayed") sentence. If the lesser offences – misdemeanours or their Canadian equivalent – were covered by the grid this would have the immediate implication that all convicted offenders, however petty their crime, would receive a suspended custodial sentence and would therefore be under the threat of incarceration. A community sanction would have to be imposed under the umbrella of a suspended custodial sentence. This feature of what might be called an expanded version of the Minnesota model clashes with all the Commission's recommendations on community sanctions, as it will clearly be seen in the next chapter. It would also contradict the principle of restraint. The Minnesota model is not intended to deal with all criminal offences, and would be inadequate for this task.

c) The computation of offender scores

In the Minnesota model, the prior criminal history of an offender is assessed through the application of a series of rules which result in a numerical score. Although this procedure is rigorous and avoids arbitrariness, it also generates unintended and undesirable effects. Before describing one of these effects, we shall state that the Commission's recommended guidelines do not involve the computation of any scores.

d) Automatic progression towards greater severity

There is one unintended effect of the computation of a criminal history score which is detrimental to the aims of the Minnesota model. One of these aims is to reduce the size of the prison population. As indicated in the grid, sentences get more severe as an offender is deported to the right hand side of the grid where the criminal history score is the highest. Pushing the offender to the right hand side of the grid can be easily accomplished by laying multiple charges against him or her. This procedure is often referred to as "building the book on an offender". The effect of such a process is enhanced by the computation of scores – a cumulative process which does not allow any turning back. Through multiple convictions, which can be artificially orchestrated by the prosecution and the police, an offender is driven towards the most severe sentences. Again, this feature of a sentencing grid is incompatible with the principles of restraint and equity in the use of incarceration.

e) The in/out dichotomy

An obvious feature of a sentencing grid is its rigidity. Hence, there is no middle ground provided to the sentencing judge for exercising his or her discretion in making the in/out decision. As it will be seen later, the Commission's recommendations do provide such a middle ground.

f) Narrow custodial ranges

This is another feature of the Minnesota Sentencing Guidelines apparent at a glance. Except for the most serious offences, the scope of the custodial ranges is no greater than ten months. It is often under ten months. The custodial ranges which are determined in the Commission's guidelines are wider than the Minnesota ranges.

g) An excluded list of factors

In addition to listing aggravating and mitigating factors or circumstances which may be used as grounds for a departure from the guidelines, the Minnesota model has also a list of factors which should not under any circumstances be considered by the judge in determining a sentence.

Section 15 of the Canadian *Charter of Rights and Freedoms* prohibits discrimination on a number of specified grounds such as sex, race or religion. However, the *Charter* does provide that these grounds may be invoked in establishing affirmative action programs. The Commission has formulated a principle on the use of aggravating and mitigating factors which reflects the spirit of the *Charter*. Instead of presenting a list of factors which cannot be used under any circumstances, the Commission recommends that some factors should not be used to discriminate against offenders but that they may be used to alleviate their plight. As we shall see, this recommendation could be particularly important for female and native offenders, among others.

h) A limited right to appeal

Only departures from the guidelines can be appealed in Minnesota. The Commission believes that any sentence, whether it complies with a set of guidelines or departs from it, ought to be appealable. As stated before, there may be injustice in treating as a standard case one which is truly exceptional and which should be resolved by departing from the guidelines.

i) No policy role for the Courts of Appeal

In the Minnesota model, the State Supreme Court reviews departures from the guidelines when a sentence is appealed. The Court plays no significant part in formulating sentencing policy. This Commission will recommend a modification of the *Criminal Code* that will enhance the role of Courts of Appeal in formulating sentencing policy.

j) National uniformity

Finally, by its very rigidity, the Minnesota model is designed for uniform application and cannot incorporate without difficulty regional variations. In this respect, the Minnesota model is the exact opposite of the guideline judgment model which has mainly a provincial application. We repeat that there should be a balance between national and local interests that reflects the political reality of Canada.

As previously mentioned, this list is not exhaustive. For example, there is, in Minnesota, a difference between jails and prisons, jails being smaller facilities used for short terms of incarceration. Oddly enough, an offender whose sentence is a presumptive “out”, may receive a term of incarceration. In the words of Kay Knapp, the former research director of the Minnesota Sentencing Guidelines Commission, “a non-imprisonment sanction can include incarceration of up to a year in a local jail or workhouse”.¹⁶ Needless to say, in the Commission’s proposals, non-custodial sanctions never include incarceration.

The simplicity of a two-dimensional grid is more apparent than real. There are indeed a number of features of this guideline model that do not immediately meet the eye, but which upon closer examination make this model inappropriate for application in the Canadian context. None of the features that we have discussed are incorporated in the guidelines model recommended by this Commission.

Benchmark Guidelines

Before formulating the Commission's recommendations on sentencing guidelines, the benchmark approach advocated by the Law Reform Commission of Canada (LRCC) submission deserves mention. Although it is highly influenced by the Minnesota model, the LRCC benchmark approach is based on a much simpler structure. Basically, it consists of grouping offences in classes, according to their seriousness, and in determining a benchmark or, in other words, a custodial tariff for each class of offence. This benchmark is purportedly based on current practice. Although these proposals are acknowledged by the LRCC to be tentative, three points should be made about the benchmark approach.

First of all, the classes of offences for which benchmarks are formulated are very broad and include offences for which actual sentencing practice is quite different. For example, aggravated robbery and aggravated assault are included in the same class; the benchmark for this class of offence is seven years imprisonment (plus or minus 15%). According to sentencing data collected by the Commission, 28% of offenders convicted of aggravated assault do not receive a custodial sanction. Of those who are incarcerated, only 3% receive a sentence longer than five years in prison; 58% receive a sentence of one year or less.

The *Criminal Code* does not distinguish between simple and aggravated robbery and, consequently, there are no specific data on aggravated robbery, *per se*. Still, taking into account all cases of robbery, the sentences for this offence appear to be significantly more severe than for aggravated assault. Twenty percent of robbers receive a sentence of incarceration which is longer than five years (as compared with only 3% for aggravated assault). It is unlikely that an offender convicted of a serious robbery will not receive a custodial sentence. However, not only do these offences involve different patterns of sentencing, but the benchmark for this class is set much too high. Ninety-seven percent of all offenders convicted of aggravated assault receive a sentence of five years or less (58% are sentenced to one year or less); 80% of the robbers receive a sentence of five years or less (43% receive a term of incarceration under two years). If the benchmark were applied, all these offenders would receive approximately seven years in jail. The prison population would swell correspondingly. The point that we are making is not merely empirical and hence cannot be answered by just lowering the benchmark: the benchmark approach allows for too little differentiation between the classes of offences and it forces uniformity on a diversity of practices (which are often justified in their diversity by the nature of the offences).

The LRCC benchmark approach rests on a rather strict just desert rationale. If the Minnesota guidelines enshrine the offender's prior criminal record in a grid, the LRCC submission does the opposite: the prior criminal history plays a minimal role in sentencing according to this approach. This would imply a very radical departure from current sentencing practice in Canada. Research undertaken for the Commission has shown that the offender's previous record was cited more frequently in appellate jurisprudence than any other factor except the seriousness of the offence (*Benzvy Miller, 1986; 19-20*).

Finally, according to this approach, all offences are in theory linked to a custodial sanction, the length of which is determined by the benchmark. It is stipulated that those offences which carry the lower benchmarks of six and two month terms of incarceration, should normally result in a community sanction. It is possible that the only way to impose a community sanction in these cases would be to suspend the custodial terms implied by the benchmark. As we have discussed in the context of the Minnesota grid, this consequence is highly undesirable.

Conclusion

Although most of these models embody interesting features, there is not one that is, in the opinion of the Commission, wholly satisfactory for the Canadian criminal justice system. Hence, the Commission had to create a unique model of sentencing guidelines tailored to the Canadian context. This model is presented in detail below.

5. Sentencing Guidelines for Canada

This part of the chapter is devoted to the Commission's recommendations on sentencing guidelines. The first component of a set of guidelines is the formulation of a sentencing rationale. The Commission's proposed *Declaration of Purpose and Principles of Sentencing* (Chapter 6) provides the sentencing rationale upon which these recommendations are built.

The issues relating to the Commission's recommendations on sentencing guidelines will be addressed in the following order: degree of constraint imposed by the guidelines; guidance on the nature of the sanction; guidance on the quantum of the sanction (custodial ranges); format of the guidelines; aggravating and mitigating circumstances; special rules; the role of Courts of Appeal and the creation of a Judicial Advisory Council.

5.1 The Degree of Constraint

5.1.1 Advisory Guidelines

Purely advisory guidelines, which have been implemented in some states in the United States, consist of structured information on sentencing practices

which is submitted to sentencing judges. The assumption on which advisory guidelines rest is that judicial knowledge of actual sentencing patterns will lead judges to follow them and that unwarranted disparity will be thus reduced. Compliance with the guidelines is entirely voluntary (these are referred to in the literature as voluntary descriptive guidelines).

In 1983, the U.S. National Research Council commissioned a Panel on Sentencing Research to assess the impact of various sentencing reforms. The assumption that judges would voluntarily comply with descriptive guidelines was found to be false. In its report, the Panel on Sentencing Research stated “that formal compliance with voluntary/descriptive guidelines has apparently been limited in the jurisdictions studied.¹⁷ In contrast, formal compliance with presumptive guidelines was found to be substantial.¹⁸ Cohen and Tonry (1983) who wrote an elaborate report on the impact of guidelines for the Panel on Sentencing Research were negative in their assessment of advisory guidelines:¹⁹

There is little evidence of formal compliance with voluntary/descriptive guidelines in the jurisdictions studied...Lawyers and judges interviewed in Philadelphia and Denver indicated that few judges made significant efforts to comply with the guidelines... .

Other studies such as Galegher and Carroll (1983), “*Voluntary Sentencing Guidelines: Prescription for Justice or Patent Medicine?*”, also confirm that purely advisory guidelines have little or no effect. After examining these studies, the Commission was convinced that advisory guidelines only provide advice where real guidance is needed. They have not proven to be an efficient remedy to unwarranted disparity and they play no role in the crucial issue of controlling the increase of prison populations. Wishing to avoid the mistake of importing into Canada a solution which has failed elsewhere, the Commission resolved to recommend against the adoption of purely advisory sentencing guidelines.

5.1.2 Presumptive Guidelines

The phrase “presumptive sentence” may be relatively new. However, the idea of presumptive sentencing is not. In its 1969 report, the Ouimet Committee made the following recommendation, which the Commission considers to be a step in the direction of presumptive sentencing:²⁰

The Committee recommends that the Criminal Code be amended to provide that no sentence of imprisonment should be imposed without an accompanying statement of reasons.

The context of this recommendation makes it clear that it is meant to introduce a presumption of non-custody for most offences. Actually, the same recommendation was made very recently by a Québec committee that was explicitly directed to examine the ways to reduce the use of incarceration (Québec, 1986). It then becomes obvious that such a recommendation is tantamount to supporting an overall presumption of non-custody. The Ouimet Committee’s recommendation was endorsed several times in the reports issued

by the Law Reform Commission of Canada. The 1975 Working Paper on *Imprisonment and Release* declared (p. 16):

Because the sentence of the court ought to serve as an educative statement and be understood as a reasoned disposition, the sentence should be accompanied by written reasons. Such reasons should work for fairness in the system by keeping unnecessary disparities to a minimum *and facilitating the task of the courts where appeals are taken*. They should also assist the administrative authorities in making decisions affecting the sentence and thus help to avoid conflict and misunderstanding. (Our emphasis)

The 1977 Law Reform Commission of Canada report entitled *Guidelines; Dispositions and Sentences*, recommended that written reasons be provided by judges to justify sentences imposed.²¹

Actually three of the pivotal points upon which the type of constraint embodied in a presumptive sentencing scheme rest are clearly identifiable in the above quoted recommendations. They are: (a) the provision of written reasons to justify a sentence; (b) reliance on Courts of Appeal to review the validity of these reasons; and (c) that written reasons be required by law (e.g., the Ouimet Committee recommended that the *Criminal Code* be amended to provide that written reasons be given to justify incarceration). We shall briefly review these three features.

a) The provision of written reasons

The Ouimet Committee and the Law Reform Commission of Canada recommended the provision of written reasons for all custodial sentences. This requirement may prove to be burdensome because of the high volume of custodial sentences.

11.1 The Commission recommends that written reasons be provided every time the judge imposes a sentence which departs from the sentencing guidelines.

The judge may record the reasons in writing or they may be stated in the record of the judicial proceedings. In stating the reasons for departing from the guidelines, the judge should be explicit and thorough. A non-exhaustive list of aggravating and mitigating circumstances will be provided with the guidelines. They may be considered as the primary grounds to justify departures. The explicit reasons provided by the trial judge will be an invaluable source of information for Courts of Appeal in their review of sentences and for future updating of the sentencing guidelines. In making its recommendation, the Commission has built upon previous proposals of the Ouimet Committee and the Law Reform Commission of Canada. However, in limiting the requirement that written reasons be provided only in cases of departures from the guidelines, the Commission makes the implementation of previous recommendations more feasible.

The requirement that the reasons justifying a departure from the guidelines be explicitly stated is the only practical constraint imposed by

presumptive guidelines. This is why presumptive guidelines are referred to as advisory by several authors as well as the Minnesota legislation on guidelines. In its submission to this Commission, the Law Reform Commission of Canada recommends that sentencing guidelines take the form of presumptive custodial ranges (benchmarks) developed by a Sentencing Commission, and from which the sentencing judge could depart, if he or she stated the reasons for departing. Such a presumptive scheme is described as advisory in the Law Reform Commission's submission (p. 67):

Since the benchmark can be deviated from initially, by 15% and by more than 15% where "compelling reasons" exist, it would be proper to classify such a system of benchmark as "advisory" to the sentencing judge rather than mandatory. Discretion is not eliminated; it is simply structured.

Referring to presumptive guidelines as advisory has the important advantage of dispelling the misunderstanding that they are mandatory. Unfortunately, it also has the disadvantage of suggesting that they are merely exhortative. For the sake of clarity, it is not more advisable to refer to presumptive sentencing guidelines as being advisory than it is to describe them as mandatory. Presumptive guidelines imply a degree of prescription, not only because written reasons must be provided for departures, but also because these reasons must be explicit and adequate to withstand the scrutiny of the Courts of Appeal. As we shall later see, trial judges, in determining whether to follow or depart from guidelines in a particular case, are not accountable to any other authority but they are subject to appellate review.

Presumptive guidelines represent an attempt to avoid the difficulties previously acknowledged in the use of purely advisory guidelines, which have little, if any, force, and mandatory guidelines, which are too coercive. They should be considered as a form of guidance in their own right and not be confused with what they are not intended to be. Admittedly, presumptive guidelines have features which, in some aspects, are similar to advisory guidelines and, in other aspects, are similar to mandatory guidelines. However, it should be emphasized that a limited number of similarities or common features do not produce a complete identity. The Commission sees presumptive guidelines as falling in a middle ground between mere exhortation and coercion – presumptive guidelines are neither advisory nor mandatory: they are presumptive.

b) Courts of Appeal

The Courts of Appeal play a crucial role in the application of presumptive sentencing guidelines. They ensure that the review of compliance or departures from the guidelines will be performed by a body which is independent of the policy-making commission. Thus the distinction between the case by case level and the policy-making level will be preserved. The Commission has already indicated that it will recommend that Courts of Appeal play an enhanced role in the establishment of sentencing policy. This issue will be addressed at the end of this chapter.

The Commission sees no reason to limit the right to appeal a sentence.

11.2 The Commission recommends that a sentence, whether it is within the sentencing guidelines or departs from them, can be appealed either by the defendant or the Crown prosecutor.

c) Legal Status of Sentencing Guidelines

When one formulates a rule, one must be prepared to answer a question which immediately springs to mind: what is the consequence of not following the rule? In the case of presumptive sentencing guidelines, the consequence is that the judge must state his or her reasons for departure, which will be subject to the scrutiny of appellate review. This is precisely what was meant when it was previously said that the only constraint introduced by presumptive guidelines is the requirement to provide explicit reasons to justify a departure. However, this last statement does not imply that there is otherwise no prescriptive element in the guidelines. Sentencing guidelines are developed through a lengthy process of consultations and they are supported by systematic research. They do not merely amount to a sentencing opinion, which can be discarded at will, but rather must be followed under normal circumstances. We have stressed how difficult it is to describe how binding presumptive guidelines are, without falling into the misunderstandings which stem from the use of the terms “advisory” and “mandatory”. According to the current meaning of the word, as it is defined in the Webster dictionary, a *directive* serves to guide action more by promoting and by impelling than by dominating. A good way to characterize presumptive guidelines, then, would be to say that they are intended to be directives in exactly that sense.

In order to be more than a mere request for voluntary adherence, a directive must be grounded in legislation. However, in order to guide rather than compel, a directive, as it is understood in this report, does not require the full force of a codified statute enacted by Parliament according to the standard legislative process. However, the enabling legislation should explicitly state the degree of prescription intended.

The Commission rejected the option that the sentencing guidelines be enacted as legislation. There are less rigid ways of providing a legal basis for the guidelines. It would be possible to provide for the adoption of national sentencing guidelines, as developed by this Commission and its permanent successor, by way of either a negative or an affirmative resolution by either Parliament or the House of Commons.

There are currently provisions in the *Unemployment Insurance Act* 1970-71-72 Can., c. 48, s. 4(2), and the *Government Organization Act* R.S.C. 1970, c. 14 (2nd supp.), s. 18, that make regulations or proclamations adopted under these statutes by the Unemployment Insurance Commission and the Governor-in-Council respectively, subject to an affirmative resolution of Parliament. Regulations and proclamations, under these statutes, come into effect only upon being affirmed by resolution of Parliament. Affirmation by Parliament

does not, in our view, affect the true character of these regulations in that they are regulations which, for all intents and purposes, have the full force of the law, although when affirmed by Parliament they are not strictly speaking laws, but regulations.

An affirmative resolution by Parliament would most likely have more impact upon the judiciary (and other interested parties) as it would constitute a positive statement by legislators on the merit of guidelines. There are however several drawbacks to the affirmative resolution option. These drawbacks have to be considered in the context of the Commission's often-asserted position that sentencing guidance should not be confused with legal coercion. Hence, it may be that the affirmative resolution technique provides more authority than is really needed.

First of all, it seems inconsistent to expect Parliament to debate and approve a set of guidelines by affirmative resolution without granting it, as well as the Governor-in-Council, the power to consider and modify the guidelines developed by the Commission or the body that will succeed it. If the guidelines are to be the object of a debate leading to an affirmative resolution in Parliament, one or two things will happen. Either the government will be given the opportunity to consider – and eventually to approve – the guidelines prior to their examination by Parliament or it will not. In the first instance, the Cabinet may proceed to consider and amend the sentencing guidelines. Such direct intervention by the executive into sentencing matters is incompatible with the Canadian tradition of the independence of the judiciary from the executive. If, on the other hand, the government is denied the opportunity to review the guidelines before tabling them in Parliament, a free vote situation may arise. Such a situation is likely to trigger an unsystematic process of amendment of the guidelines which could greatly imperil the consistency of their structure.

Second is the fact that traditionally the determination of sentences has been, and in the view of the Commission should remain, the responsibility of the judiciary. Accordingly, that is probably the most crucial reason why Parliament should refrain from getting involved in the detailed consideration of sentencing guidelines which are intended to guide the application of the law in particular cases. The proper role of Parliament is to legislate national policy. Public policy is for general application and by its very nature cannot be equally applicable to all cases without relevant interpretation. It runs contrary to tradition that Parliament should determine how the law is to be applied in specific cases. This responsibility with regard to sentencing must rest with the judiciary. In order to maintain the necessary balance of authority in our sentencing process it is important that Parliament set the general parameters and leave to an independent judiciary the application of the policy in individual cases.

Finally, there is a timing problem. The guidelines would have no force or effect unless and until they have been approved by resolution. Although the Minister of Justice would be required to table the guideline proposals expeditiously, it might be difficult in some circumstances to ensure timely

consideration of an affirmative resolution by Parliament having regards to other governmental priorities. Indeed, there is no assurance that the resolution could be disposed of one way or another in a timely fashion, and it is extremely doubtful that the government would want to bind itself by legislation to a specific timetable for the parliamentary consideration of such resolutions.

The technique of a negative resolution, on the other hand, would not involve the kind of timing problem to which we have referred above. As the Governor-in-Council would not deal with the proposed guidelines, the Minister of Justice should be required to table them in Parliament within two weeks of their receipt. It would be necessary to provide time for discussion and debate in the House of Commons only if a certain number of members were to bring forward a negative resolution (rejecting the guidelines) for parliamentary consideration. We propose that this number be a minimum of 20 members. It is likely that, in the absence of a strong objection to the recommended guidelines, there would be no need for debate and discussion and the proposed guidelines would come into force by the mere passage of the time provided in the legislation for the presentation of a negative resolution. In practice, this implies that the guidelines would come into force at the expiry of a specified period of time. The Commission is of the view that 90 days is an appropriate period.

If a negative resolution was formulated and passed by Parliament, the guideline proposals would have to be referred back to the permanent sentencing commission for review. After appropriate modifications had been made, the guidelines would be tabled again in Parliament. The same technique of negative resolution would subsequently be used to adopt updated versions of the guidelines.

Finally, it is worth noting that the troublesome issue raised by the power of government or of the members of Parliament to amend the guidelines would not arise if the technique of the negative resolutions were used.

The technique of a negative resolution would provide a mechanism akin to a safety valve to ensure that the sentencing commission is accountable to Parliament for the national guidelines that it proposes. The technique would, in effect, provide a democratic and public channel for the expression of concerns and objections that the proposed guidelines might raise. It is difficult to see why anything more than ensuring the accountability of the sentencing commission by a global assent would be required or justified, having regard to the nature of the guidelines and the manner in which the proposed regime would operate. In other words, it is difficult to see the justification for, or the interest in, forcing a detailed parliamentary debate leading to an affirmative resolution in respect of all guidelines, when in most, if not all cases, they may not raise controversy or objection. Finally, it bears repeating that we are not here concerned with binding regulations but with presumptive guidelines whose applicability to an individual case remains to be determined by the sentencing judge.

Given the nature and applicability in practice of sentencing guidelines and the procedure suggested for their implementation it is the view of the Commission that the guidelines should come into force unless rejected by negative resolution only of the House of Commons. The reasons discussed earlier in support of the adoption of a negative rather than affirmative resolution procedure for implementation of the guidelines apply equally to justify consideration of the guidelines only by the House of Commons. The consideration of guidelines by both the House of Commons and the Senate would be unduly cumbersome and militate against the expediency required to operationalize the guidelines. In addition, requiring the sanction of both Houses of Parliament would increasingly politicize the process without yielding any significant advantage over a tacit approval by the House of Commons only.

Accordingly, and after having consulted with leading Canadian experts in the field of criminal and administrative law:

11.3 The Commission recommends that the sentencing guidelines should be tabled in the House of Commons by the Minister of Justice within 15 days of their receipt and would come into effect at the expiry of 90 days unless rejected by negative resolution of the House of Commons. In order to be considered, such a resolution would have to be presented by a minimum of 20 members of the House.

It is understood that the legislation authorizing the enactment of guidelines would provide that where the House of Commons is not sitting when the Commission's guidelines proposal is received by the Minister of Justice that he or she would be required to table the proposal in the House of Commons within fifteen days of the continuation of the session or the commencement of the next ensuing session, as the case may be.

A final question that also needs to be examined is whether the guidelines would be governed by the provisions of the *Statutory Instrument Act*, 1970-71 (Can.), c. 38. It would seem, although this is not entirely free from doubt, that the answer to this question might well be in the affirmative. The guidelines appear to come within the wording of subsection 2(d)(i) of the *Act* and are not excluded by any of the many exceptions listed in the *Act*. Accordingly, the *Statutory Instrument Act* could be held to apply to the proposed national sentencing guidelines.

Although it may be debatable whether or not the type of guidelines proposed by the Commission would qualify as statutory instruments, it is difficult to see any justification for the application of the *Statutory Instrument Act* to the proposed guidelines, having regard to their nature and manner of application. None of the concerns that led to the adoption of the *Statutory Instrument Act* would prevail under the proposed regime. It is clear that presumptive guidelines, unlike regulations, are not of universal application but their application depends on a judicial determination. This is so whether the guidelines are followed or departed from. While it is expected that trial judges will, in most instances, follow the guidelines, they are not bound to do so in

individual cases where they feel that there are valid reasons for departing therefrom. However they must state their reasons for any such departure. That decision is reviewable only by the Court of Appeal. Furthermore, as we shall see later, the Courts of Appeal will be given the power to amend national guidelines in appropriate cases. Such is never the case with statutory instruments. With regard to any argument regarding the possible abuse of delegated legislative authority (if the procedure for enactment of guidelines by the permanent sentencing commission can be so termed) it is submitted that the authority of the House of Commons to refuse approval and the power of the courts to depart from the guidelines in appropriate individual cases should be sufficient to alleviate any such concern.

For these reasons and those discussed earlier, the Commission does not see the need for scrutiny of proposed guidelines by a Parliamentary Committee as would normally obtain in the case of statutory instruments as defined by the *Statutory Instrument Act*. Any concern relating to the public notice and availability of the guidelines could be met by appropriate provisions in the *Criminal Code* governing their publication.

11.4 The Commission recommends that the *Statutory Instrument Act* be amended specifically to exclude the national sentencing guidelines from the application of the Act.

5.2 Guidance and the Nature of Sanctions

For reasons already outlined, the Commission decided to provide explicit guidelines on the use of incarceration, and to formulate general principles on the use of community sanctions. These general principles will be discussed in the next chapter. Within the context of the Commission's policy proposals, guidance on the nature of the sanction to be imposed refers to deciding when a custodial sanction is appropriate, and when it is not. The Commission recommends that a presumption guiding the choice between a custodial and a non-custodial sentence be assigned to every offence defined in the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act*. These presumptions will be referred to as "dispositional" presumptions, according to common usage in the sentencing literature. Presumptive dispositions were determined by the Commission for all these offences. Before outlining them, it will be necessary to discuss the nature of these presumptive dispositions.

5.2.1 A Rationale for Presumptive Dispositions

The Commission's approach to this problem derives from the sentencing rationale expressed in the *Declaration of Purpose and Principles of Sentencing* which appears in Chapter 6 of this report. According to paragraph 4(c)(v) of this declaration, a term of imprisonment should be imposed only:

- aa) to protect the public from crimes of violence,

- bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,
- cc) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.

These justifications for the imposition of a custodial sanction refer to offences which can be classified at different levels of seriousness. The first justification refers to violent offences against persons; these offences belong to the highest level of seriousness. Offenders convicted of these offences will be presumed to be incarcerated. The second justification is more qualified than the first one. It does not refer exclusively to a specific group of offences and it introduces considerations such as the criminal record of the offender, the need to protect the public and to defend the integrity of the criminal justice system. One would expect offences belonging in the middle level of seriousness to be varied in their nature. Likewise the decision of whether to incarcerate offenders convicted of these offences would depend upon the particular circumstances surrounding the offender and the offence.

Although meant to exclude imprisonment for an incidental failure to comply with the terms of a non-custodial sentence (e.g., defaulting payment of a fine), the third clause quoted above refers indirectly to offences which do not in themselves carry a presumption in favour of incarceration. Indeed it is assumed in the clause that the offender had originally received a non-custodial sentence. These offences belong at the lowest level of seriousness.

It seems clear that the most serious offences (e.g., hijacking or aggravated sexual assault) compel a presumptive disposition of incarceration. It is equally clear that offences at the lowest level of seriousness (e.g., summary conviction offences) should be dealt with by a presumption of non-custody.

However, in terms of offences in the mid-range of seriousness, the Commission concluded that a simple rule to determine whether the presumption would indicate incarceration or otherwise was inappropriate. There are many offences in this middle category and they vary greatly in nature. Most importantly, however, the choice between custody and non-custody could not be made independently of the particular circumstances in which the offences were committed.

To accommodate offences of this type, the Commission decided to add two qualified presumptions to the standard unqualified presumptions of custody and non-custody (the "in" and "out" presumptions). These qualified presumptions are referred to as "*qualified in*" and "*qualified out*" respectively. The qualified presumptions incorporate the most relevant features of a case which should be considered in deciding whether or not to incarcerate the offender. According to systematic research into Canadian jurisprudence conducted by the Commission, the core features of a case are, for the purposes

of sentencing, the seriousness of the particular act, and the criminal record of the offender.

To summarize thus far: the Commission's recommendation on the use of guidelines to determine whether or not an offender should be incarcerated is to apply one of four presumptive dispositions to each criminal offence. These four presumptions are:

- i) An unqualified presumption of custody. For the sake of brevity this will be referred to as *Presumptive "IN"*
- ii) An unqualified presumption of non-custody: *Presumptive "OUT"*
- iii) A qualified presumption of custody: *Qualified "IN"*
- iv) A qualified presumption of non-custody: *Qualified "OUT"*

Before assigning these presumptive dispositions to particular offences we shall explain their meaning in greater detail.

5.2.2 The Meaning of Presumptive Dispositions

a) The general meaning

Throughout this discussion the following important point should be borne in mind. The presumptions, by their nature, allow for departures in appropriate cases for which explicit reasons must be provided.

The general meaning of the unqualified presumption is simple. Unless a judge sees fit to depart from the presumptive disposition, an offender convicted of an offence for which the presumption is custody ("IN") should be incarcerated. Likewise, an offender convicted of an offence for which the presumption is non-custody ("OUT") should receive a non-custodial sanction. By the term "unqualified" we mean that for these offences the decision whether or not to impose custody is not dependent upon the particular circumstances of the case. Thus, for example, someone convicted of hijacking will, in all but the most exceptional circumstances, be sent to jail. In all but the most exceptional circumstances an offender convicted of a minor gaming offence will *not* go to prison. Of course, circumstances become of paramount importance if the judge wishes to depart from an unqualified presumption, for instance if the judge wishes to impose a non-custodial sentence on a hijacker.

The assessment of the circumstances of a particular case assumes a different significance for the offences carrying qualified presumptions. The offence of theft provides a striking example of this. The *Criminal Code* distinguishes between theft over \$1,000 and theft under \$1,000. Theft over is defined in the *Code* as the unlawful deprivation of property which has a value over \$1,000. However, how far over can range from \$1,001 to millions of dollars. The decision whether or not to imprison a thief is likely to be different if he has stolen \$100,000 rather than \$1,001. The magnitude of the theft –

which plays a crucial role in determining whether the offender goes to jail – can only be determined by examination of the facts of the particular case.

It follows then, that when the nature of the appropriate sanction does not flow from the definition of the offence, consideration should be given to the circumstances surrounding the commission of the offence. Theft is perhaps the best example of this, but all crimes at the middle level of seriousness share this characteristic. However, the circumstances or the factors used to define a qualified presumptive disposition should be few and precisely-defined, in order not to undermine the concept of guidance which underlies the whole scheme of sentencing guidelines.

The sentencing literature acknowledges the potentially infinite variety of circumstances in which an offence can occur. If a qualified presumption is dependent upon an assessment of all the relevant facts of a case, the presumption will remain undefined since it will be based upon an undetermined number of circumstances. As already noted, two factors that were selected were the seriousness of the particular act (relative to other instances of this offence) and the criminal record of the offender. Not only do they derive from current jurisprudence but they are also consistent with the Commission's sentencing rationale which assigns priority to the principles of proportionality and restraint.

The seriousness of the offence is to be generally understood as the *quantum* of harm generated by the offence. This quantum of harm may refer to the degree of physical harm (in the case of an offence against persons) or to the magnitude of loss (in the case of offences involving property). In the case of offences against the administration of justice, it would refer to the extent to which the offence impedes the process of justice.

For the purpose of defining presumptive dispositions, the offender's record is to be considered according to the principle of "the progressive loss of mitigation"²². According to this principle, first offenders or those with previous convictions who have remained law-abiding for a substantial period of time should be entitled to a significant reduction. A relevant criminal record disentitles an offender to leniency rather than entitling him to more severity.

Thus, the qualified "In" disposition should be understood in the following way:

The offender is to be incarcerated unless *both* of the following conditions are met: the offence is not serious AND the offender has no relevant record.

The presumption of qualified "Out" should be understood as follows:

The offender is not to be incarcerated unless *both* of the following conditions are met: the offence is serious AND the offender has a relevant record.

The word "offence" used in these definitions does not refer to the general definition of the offence to be found in the *Criminal Code* (e.g., the definition of theft over \$1,000) but to the actual particulars of this act (e.g., an offender

who has stolen \$10,000). It must be stressed that *both* conditions have to obtain in order to apply the qualified part of the presumption (i.e. not to incarcerate in the case of a *qualified "in"* or to incarcerate in the case of a *qualified "out"*). The qualified dispositions lose their proper meaning if the words "one" and "or" are respectively substituted for the words "both" and "and". The reasons for this are rather technical and are therefore dealt with in Appendix G.

b) An illustration

The system of presumptive dispositions proposed by this Commission is more flexible, but also more complex, than systems which have just two possibilities, "In" or "Out". We shall provide an illustration of how the qualified presumptions operate. This may be useful because the notion of a departure from a qualified presumption is less simple than a departure from a standard unqualified presumption of "in" or "out". Simply put, a judge departs from a presumptive "in" if he or she does not incarcerate the offender; likewise for a presumptive "out" the judge departs if he or she incarcerates the offender. The situation is rather different for the qualified presumptions because they incorporate both alternatives, i.e. custody and non-custody. For instance, when made explicit the meaning of the *qualified "out"* presumption can be expressed thus:

The offender is not to be incarcerated unless both of the following conditions are met: the offence is serious AND the offender has a relevant record.
However if both conditions are met then the offender is to be incarcerated.

The Commission recommends that theft over \$1,000 be given a qualified out presumptive disposition. We shall use this example to illustrate the possible outcomes of applying the presumptive *qualified "out"* disposition. There are eight possible outcomes: four of which comply with the presumption and four which depart.

Compliance Outcomes

- i) the theft was not a serious instance of this offence (e.g., the sum of \$1,100 was stolen) and the offender has no relevant record (e.g., a first offender). The judge *does not impose* a sentence of incarceration.
- ii) the theft was a serious instance of this offence (e.g., \$10,000 was stolen) and the offender has a lengthy record of offences against property. The judge *does impose* a sentence of incarceration.
- iii) the theft was a serious instance (e.g., \$100,000 was stolen) but the offender has no relevant record (e.g., a first offender). The judge *does not* impose a sentence of incarceration, because only one of the two conditions for custody is present.
- iv) the theft was not a serious instance of the offence (e.g., \$1,100 was stolen) but the offender has the record of a career criminal. The judge *does not* impose a sentence of incarceration, because only one of the two conditions for custody is present.

Departure Outcomes

- v) the theft was not a serious instance (e.g., \$1,100 was stolen) and the offender has no relevant record (e.g., a first offender). The judge *does impose* a sentence of incarceration, which he or she justifies by using one or more of the aggravating factors allowed by the sentencing guidelines.
- vi) the theft was a serious instance of this offence (e.g., \$10,000 was stolen) and the offender has a lengthy record of offences against property. The judge *does not impose* a sentence of incarceration, which he or she justifies by using one or more of the mitigating factors allowed by the sentencing guidelines.
- vii) the theft was a serious instance (e.g., \$100,000 was stolen) but the offender has no relevant record (e.g., a first offender). The judge *imposes* a sentence of incarceration and justifies it by referring to the magnitude of the loss which itself warrants a term of custody, even for a first offender. The judge may also cite other aggravating factors. This outcome *departs* from the presumptive disposition because only one of the conditions for imposing a sentence of custody was met.
- viii) the theft was not a serious instance of the offence (e.g., \$1,100 was stolen) but the offender has the record of a career criminal. The judge *imposes* a sentence of incarceration justified here by the offender's record which warrants a custodial sentence even though the magnitude of loss was not great. The judge may also cite other aggravating factors. This outcome also *departs* from the presumptive disposition because only one of the conditions for imposing a sentence of custody was met.

As can be seen from this illustration there are more ways to depart from a qualified presumption than from an unqualified presumptive disposition. Furthermore, if both the seriousness of the offence and the criminal record conditions are met, a custodial sentence can be imposed in compliance with a presumptive *qualified "out"* disposition. In a similar fashion a non-custodial sentence can be imposed in compliance with a presumptive *qualified "in"* disposition. Having said this, it is clear that the distributions of custody versus non-custody would be different for *qualified* compared to *unqualified* presumptive dispositions. Consider the *unqualified "out"* disposition. Research has shown that departure rates are quite low; accordingly the majority of cases in *unqualified "out"* offences will receive non-custodial terms. For *qualified "out"* offences the pattern would be a little different. An offender convicted of a qualified out offence can receive a non-custodial sentence or go to jail. Accordingly while the majority of qualified out cases will result in non-custodial sentences, the proportion getting non-custodial sentences will be lower than for *unqualified "out"* offences.

A similar pattern would be observable for the "in" categories. While the majority of *qualified "in"* cases would result in custody, the proportion incarcerated would be lower than for the *unqualified "in"* category.

Another point bears discussion concerning departures. Research has demonstrated that departures from presumptive dispositions are not evenly

divided. There is a tendency for these departures to favour leniency in sentencing. In fact, there are usually three to four times more departures in the direction of leniency than in the direction of severity.²³

As can be seen from the previous illustration, the pattern of compliance with and departures from a qualified presumption is more complex than in the case of an unqualified presumption. The unqualified presumption allows for two possibilities: one way to depart and one way to comply. As we have just shown, the qualified presumption allows for 8 possibilities: four ways to comply and four ways to depart. It should however be stressed that a qualified presumption is no less determinate than an unqualified one. As they are applied to solve cases which are not clear-cut, it is only natural that their use be more sensitive to the circumstances of these cases. One would also expect the split between custodial and non-custodial dispositions to be more pronounced for the unqualified presumptions.

11.5 The Commission recommends that four presumptions be used to provide guidance for the imposition of custodial and non-custodial sentences:

- **unqualified presumptive disposition of custody**
- **unqualified presumptive disposition of non-custody**
- **qualified presumptive disposition of custody**
- **qualified presumptive disposition of non-custody.**

The meaning and application of these terms is to be understood according to the explanations already provided.

5.2.3 The Assignment of Presumptive Dispositions

The Commission has assigned a presumptive disposition to every offence in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act* (Parts III, IV). The words “IN” and “OUT” refer respectively to presumptions of custody and non-custody. The letters “QI” (Qualified In) and “QO” (Qualified Out) indicate qualified presumptions of custody and non-custody.

In assigning these presumptive dispositions the Commission was guided by its sentencing rationale and especially by the principles of proportionality and restraint. The Commission also adopted a policy concerning the relative seriousness which it attributed to specific categories of offences. These policy statements are equally relevant for the assignment of presumptive dispositions and for developing numerical guidelines (custodial ranges). We shall note these policy statements here:

- Violent offences which result in serious harm to persons (e.g., aggravated sexual assault) should attract the longest custodial sentences.

- Large-scale economic crime and organized crime (a ring of drug traffickers) should also attract severe custodial sentences, although such offences would not be considered as serious as offences in the previous category.
- Unless there are compelling reasons, the Commission's guidelines should not contradict recent legislation and the sentences currently being imposed as a result thereof (e.g., decreasing all penalties for drunken driving).
- Offences against property, public morals, some sexual offences (e.g., gross indecency), some offences against public order and so-called transactional crime (e.g., gaming and betting) should attract lighter sentences and to the greatest extent possible, non-carceral sanctions.
- Offences against the administration of justice which currently receive a high percentage of custodial sentences should be assigned a qualified rather than an unqualified presumption of custody.

In accordance with sentencing rationale and these policy statements,

11.6 The Commission recommends that the presumptive dispositions assigned by the Canadian Sentencing Commission to the offences defined in the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* (Parts III, IV) be adopted as national sentencing guidelines for Canada.

The list of these presumptive dispositions is found in Appendix E.

5.3 Numerical Guidance

5.3.1 Limitations

The Commission will not provide numerical guidance for all offences defined in the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act*. This decision was made on several grounds. First of all, the number of offences involved is quite large (over 300). Providing a custodial range for each of these offences would have consumed too much of the Commission's time and resources. The amount of work implied would moreover be substantially increased by the disorganized state of the present *Criminal Code*. The *Code* seldom makes the necessary distinctions between different degrees of seriousness of broadly-defined offences such as robbery. With regard to other offences, such as theft, there is multiplicity of unnecessary distinctions. Finally, a significant number of offences are obsolete or redundant (e.g., witchcraft and duelling). In view of the fact that the Law Reform Commission of Canada in consultation with the Criminal Law Review section of the Department of Justice will shortly be proposing an entire revision of the *Criminal Code*, it is uncertain whether the efforts invested in determining custodial ranges for all the offences as they are presently defined in the *Code* would not be, at the least, partly wasted.

Second, due to the fact that the Commission did not have the time and resources to hold public hearings and consultations on its proposals, it has not received feedback on its policy orientations and on its recommendations. Of great importance as well is the fact that, other than through invitations for submissions and special information requests, there have not been systematic consultations with the provinces. Since the administration of the prison system – as opposed to the penitentiary system – falls under provincial jurisdiction, the determination of custodial ranges for sentences of incarceration is bound to have an impact on the size of the provincial prison population. In submitting prototypes of numerical guidelines for a selected sample of offences, the Commission will generate public discussion which should lead to worthwhile suggestions and proposals.

Finally, the Commission is recommending the creation of a permanent sentencing commission. This permanent sentencing commission should be in a position to develop further the prototypes recommended by this Commission and to finalize the ranges contained in the sentencing guidelines.

One further consideration deserves to be made. In contrast with the non-custodial sanctions, which are numerous, it is easily forgotten that custody can take several forms. Degrees of custody range from confinement in a maximum security institution to house arrest. House arrest is being considered for implementation on an experimental basis in some Western provinces. There are, however, programs which already promote the use of lesser forms of incarceration, such as forest camps and community training residences. The Commission's guidelines do not address the issue of providing guidance on the appropriate use of the alternative forms of custody. Their use is not prevalent enough to warrant the development of explicit guidelines. However, the Commission has already recommended that open custody be available to judges as a custodial sentencing option and that programs which promote the use of open custody be expanded and adequately funded. When such programs are implemented on a larger scale, a sentencing commission may be in a position to provide useful guidance as to how they should best be used.

5.3.2 Prototypes

According to the remarks made above, it is not advisable to take a uniform approach in providing offences with custodial ranges. Three kinds of operations need to be performed:

- a) Some offences are too broadly defined and must be sub-divided into an aggravated and a non-aggravated (simple) form. A paradigm case description must be provided to differentiate between these two levels of gravity and different custodial ranges must also be provided for the aggravated and the simple occurrences of the offence. The offences of robbery (ss. 302, 303 of the *Criminal Code*) and of trafficking (s. 4 of the *Narcotic Control Act*) were selected for the purposes of developing this first kind of prototype.

- b) Some offences have the same degree of seriousness and they should be provided with the same numerical range. The group of offences selected for a prototype of this kind are theft over \$1,000 (s. 283/294 (a), C.C.), possession of property over \$1,000 obtained by crime (s. 312/313 (a), C.C.), false pretence leading to theft over \$1,000 (s. 319/320 (2)(a), C.C.), and fraud over \$1,000 or pertaining to a testamentary instrument (s. 338(1)(a), C.C.).
- c) Finally, the Commission has selected the offences of manslaughter (s. 219, C.C.), sexual assault with a weapon (s. 246.2, C.C.), and break and enter in a dwelling house (s. 306(1)(d), C.C.) to provide prototypes of custodial ranges for single offences.

These offences occur very frequently and it is highly unlikely that they will not be part of any new version of the *Criminal Code*.

5.3.3 Numerical Ranges

The numerical ranges determined by the Commission were not derived from a computation of scores attributed to factors such as the seriousness of the crime and the criminal record of the offender. The ranges are proportional to the seriousness of the offence. The seriousness of an offence is usually defined by harm and by the culpability of the offender. The culpability of the offender is determined by assessing the particular circumstances of the commission of a crime and cannot in consequence be determined in advance. Hence, the custodial ranges are fairly broad to allow the sentencing judge to exercise discretion in appraising the culpability of the offender and to impose a sentence which takes into account both dimensions of the seriousness of an offence.

The custodial ranges are grounded partly in current sentencing practice. They could not be tailored to completely fit current sentencing practice because the meaning of a custodial sentence is very different under the Commission's sentencing proposals than it is at present. The Commission's custodial ranges are geared to its recommendations on the meaning of a proposed custodial sentence. According to these recommendations all offenders would serve at least 75% of their sentences in prison. The proportion of their sentence which is now served by offenders is significantly lower because of the existence of parole and release on remission. Furthermore, the Commission's commitment to the principle of restraint does not only imply that prison populations have to be maintained at their current levels, but rather implies a decrease in the use of incarceration and a corresponding reduction in the size of the prison population.

5.3.4 Formats

The Commission's recommended custodial ranges appear on the "guideline sheets", which are included in Appendix F. The guideline sheet is

the proposed format for developing the national sentencing guidelines. A guidelines sheet (an example is provided in Table 11.1) lists the name and section of an offence, its maximum penalty, its presumptive disposition, its description (if need be) and its presumptive custodial range. An advisory information package is also appended to the guidelines sheet. This package provides statistical information on current sentencing practice and appellate case law on the operation of aggravating and mitigating factors.

Table 11.1
Guideline Sheet (Prototype)

| | | | |
|------|-------------------------|---|---------------|
| I. | Offence: | Robbery ss. 302/303 <i>Criminal Code</i> | |
| II. | Maximum | 9 Years | |
| III. | Presumptive Disposition | Custody (IN) | |
| IV. | Guidelines | | |
| | <i>Category</i> | <i>Description</i> | <i>Range</i> |
| | Robbery I: | Armed robbery of banks, merchants, private dwelling, threats or use of violence | 2 – 4 years |
| | Robbery II: | Armed robbery of unprotected commercial outlets in the absence of actual physical harm to the victim; includes purse-snatching. | 4 – 16 months |

Advisory Information

| | | |
|-----|-------------------|----------------|
| V. | Current Practice: | See Appendix F |
| VI. | Case Law: | See Appendix F |

11.7 The Commission recommends that the guideline prototypes that it has developed be adopted as providing the basis for the formulation of a complete set of national numerical sentencing guidelines for Canada.

5.4 Mitigating and Aggravating Factors

5.4.1 A List of Factors

The guidelines sheets will be bound together into a sentencing manual which will also contain the advisory information. A chapter of the sentencing manual will provide the list of aggravating and mitigating factors which are to be considered as primary grounds to justify departures from the guidelines.

11.8 The Commission recommends that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

Aggravating Factors

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
2. Existence of previous convictions.
3. Manifestation of excessive cruelty towards victim.
4. Vulnerability of the victim due, for example, to age or infirmity.
5. Evidence that a victim's access to the judicial process was impeded.
6. Existence of multiple victims or multiple incidents.
7. Existence of substantial economic loss.
8. Evidence of breach of trust (e.g., embezzlement by bank officer).
9. Evidence of planned or organized criminal activity.

Mitigating Factors

1. Absence of previous convictions.
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.
4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by the offender.
7. Evidence that the offender played a relatively minor role in the offence.

The list of factors provided by the Commission is not exhaustive and other circumstances may be invoked by the sentencing judge in justifying a departure. However, the Commission gave careful consideration to the issues of

mitigation and aggravation and its list is based upon extensive research into the jurisprudence. The order in which the factors are listed is not intended to reflect any priority.

Among the proposed list of aggravating and mitigating circumstances, factors which embody the concepts of either quantum of harm/loss or prior criminal record are found. These two basic features were part of the definition of the *qualified in* and *qualified out* presumptions. Factors equivalent to these two concepts have been deliberately included in our proposed list to reflect the two primary ways in which they can be used. First, they may be used to make a global assessment of the gravity of the offence in order to determine the appropriate sanction. This exercise would include both situations where the presumptions are followed (e.g., in the case of qualified presumptions) and where there are departures from them. In other words, the factors would be used to make the decision of whether to impose custody or not.

Having made an initial assessment of the appropriate sanction, the quantum of harm/loss and the prior criminal record could then be used, in conjunction with other aggravating and mitigating circumstances, to further determine the quantitative (e.g., the *length* of imprisonment) and qualitative (e.g., the *severity* of conditions in a probation order) elements of the sentence.

5.4.2 Principles of Application

Research undertaken by the Commission has shown that a significant number of judgments just enumerate factors without specifying whether they are considered to be aggravating or mitigating. This relates to a more general point.

Even when they are pronounced by the Courts of Appeal, judgments on sentences in numerous instances are quite brief and they consist of a list of considerations which are not so connected to form a continuous argument. The Commission is of the opinion that departures from the guidelines should be justified by the trial courts in all necessary details by a well-reasoned statement.

11.9 The Commission recommends that, in order to facilitate the process of providing explicit justification for departing from the guidelines, the following principles respecting the use of aggravating and mitigating factors be incorporated in the sentencing guidelines:

Identification: when invoking aggravating and mitigating factors, the sentencing judge should identify which factors are considered to be mitigating and which factors are considered to be aggravating.

Consistency: when invoking a particular factor, the judge should identify which features of the factor lead to its application in aggravation or mitigation of sentence. (For example, rather than merely

referring to the age of the offender, the judge should indicate that it was the offender's *youth* which was considered to be a mitigating factor or the offender's *maturity* which was considered to be an aggravating factor. This would prevent the inconsistent use of age as an aggravating factor in one situation and as a mitigating factor in a comparable situation.)

Specificity: the personal circumstances or characteristics of an offender should be considered as an aggravating factor only when they relate directly to the commission of the offence. (For example, a judge might consider an offender's expertise in computers as an aggravating factor in a computer fraud case but this principle would preclude the court from considering the lack of education of a convicted robber as an aggravating circumstance.)

Legal Rights: the offender's exercise of his legal rights should never be considered as an aggravating factor.

In summary, the basic features of the occurrence of a criminal offence – the quantum of harm/loss and the criminal record of the offender – can be used in three ways. First, as part of the definition of a qualified dispositional presumption; they can then be applied in compliance with the qualified presumption (see cases i) and ii) in sub-section 5.2.2). Second, they can operate as grounds for departures from any of the four dispositional presumptions (see cases vii) and viii) in sub-section 5.2.2.). Finally, they can be used to determine the quantitative elements of a sentence, such as the precise length of custody, the exact amount of a fine, or the number of days included in a community service order. The precise length of custody can fall within or outside a presumptive numerical range. In the latter case, reasons for a departure must be provided.

There is no inconsistency in stating that the criminal record of an offender should be used as a disentitlement to mitigation when deciding whether to impose custody or not and listing it as an aggravating factor. The absence of a criminal record is actually listed as a mitigating factor in the Commission's list of factors. The presence of a criminal record should also be listed to comply with its overwhelming importance in current sentencing practice. There is no heading under which it can be listed other than as an aggravating factor. Nothing in the guidelines precludes a judge from giving greater weight to the absence of a criminal record in mitigation than the presence of a record as aggravating. Mitigating and aggravating factors are precise reasons for departing from the guidelines and as such they should be considered as the part of a set of guidelines which allows for the most discretion.

The principle of specificity has a special importance. The Commission has considered producing a list of factors which should not be used as reasons for departures from the sentencing guidelines. Race, sex, employment factors, social factors such as education attainment, living arrangements, length of residence and marital status cannot be used as grounds for departure from the sentencing guidelines implemented in Minnesota.

The Commission believes that these factors should not be used to increase the severity of a sentence but that they may be invoked in mitigation, thus effecting the promotion of affirmative action as contemplated by the Canadian *Charter of Rights and Freedoms*. For example, in most one-parent families the parent is the mother. The Commission sees no reason to discourage the implementation of programs that would prevent the break-up of such families, by providing alternatives to the imprisonment of the remaining female parent, if she has been convicted of an offence for which the presumptive disposition is custody. However, it is conceded that such programs do imply that sex and marital status are to a certain extent used as reasons for departing from the guidelines.

5.4.3 Multiple Convictions

The application of the guidelines to the sentencing of an offender convicted of several charges follows a general principle which is simple. *The offender should receive at least the most severe presumptive type of sanction provided by the guidelines for any one of the charges for which he has been convicted.*

Let us assume, for example, that an offender has been convicted of five different offences. For two of these offences, there is an unqualified presumption of custody listed in the guidelines. Regardless of what the other presumptions are, the presumption is that this offender should receive a custodial sentence. Furthermore, the sentencing judge should determine his term of custody in relation to the higher of the two custodial ranges provided by the guidelines.

The judge can depart from this rule and impose a non-custodial sentence. In this case, however, he must provide reasons for the departure. The judge can also impose a longer custodial sentence than is provided by the range corresponding to the most serious of the two offences for which there is a presumption of incarceration. However, the judge is bound by the limits governing the imposition of a total sentence. The available maximum penalty for the total sentence should be the lesser of the sum of the maxima provided for each offence or the maximum provided for the most serious offence increased by one-third. The judge should also take into account the principles guiding the determination of a total sentence. (For further explanation, see section 3.4.1 of Chapter 9).

Finally, the rationale underlying the rule formulated above is that in cases of multiple convictions, the judge determines the total sentence by starting with the most severe sanction provided for any of the offences. It is then a departure from the guidelines to transform a more lenient set of dispositional presumptions into a more severe presumption when sentencing an offender convicted of several offences. For instance, imposing custody on an offender convicted of several offences, all of which are assigned an unqualified presumption of non-custody by the guidelines, must be justified by written reasons based on aggravating circumstances.

5.4.4 Enhanced Sentences

The question arises as to the relationship between enhancements and the presumptive ranges provided by the guidelines sheets. When an enhanced sentence is imposed, the judge is employing a sentence which exceeds the maximum provided for any particular offence. Accordingly, the sentence would also exceed the range provided in the guideline sheets. All enhanced sentences are then, by definition, departures from the guidelines. They can only be imposed according to the strict criteria outlined in Chapter 9. These include a provision requiring written reasons for their imposition.

In the event that the court refused an application from the Crown for an enhanced sentence, the guidelines would then apply and the judge would have to justify any departures therefrom.

5.4.5 Time Spent in Custody

One issue upon which there is a great deal of consensus is the matter of time spent in custody as a consideration in sentencing. At the present time the *Criminal Code* (s. 649 (2.1)) permits a judge to take this time into account when determining a sentence. Nadin-Davis (1982) notes that there is general agreement that more credit should be given than was actually served. The reason for this is that time served pending trial is not affected by remission. Thus, one year of custody prior to trial is comparable to at least a year after sentencing. Some judges have settled upon a "2 for 1" rule: time served before conviction counting double. The variance in practice is a potential source of unwarranted sentencing variation. An unambiguous policy is clearly necessary.

11.10 The Commission recommends that time spent in custody before the sentence is imposed should count towards any sentence of imprisonment imposed following conviction. This time shall be credited on a one-to-one ratio with time served after conviction. An offender may earn remission upon time served prior to sentencing.

This eliminates the need for a formula whereby time spent in custody prior to sentencing is "worth" more than time served after sentencing. A majority (62%) of the judges surveyed by the Commission (Research #6) favoured taking time spent in pre-trial custody into account at sentencing. This proposal was also endorsed in the submission made to the Commission by the Canadian Bar Association.

5.5 Achieving a Balance of Authority

There is a tradition in this country of not vesting all authority in one body and of providing checks and safeguards in order to achieve a balance of power. We have already mentioned that we recommend the establishment of a permanent sentencing commission which should be accountable to Parliament.

The Commission is of the opinion that the Courts of Appeal can play a crucial role in providing a balance between a national sentencing body and provincially-based higher courts. The Commission also recommends the creation of a Judicial Advisory Council.

5.5.1 The Judicial Advisory Council

Chapter 14 will describe in detail the nature and the functions of the permanent sentencing commission. One of its basic tasks will be to complete and thereafter update the sentencing guidelines. The Commission believes that the proposals of the permanent sentencing commission should be reviewed by way of a formal consultation process with the judiciary before being submitted to Parliament. In consequence,

11.11 The Commission recommends the establishment of a Judicial Advisory Council which would act in an advisory capacity to the permanent sentencing commission, in the formulation of amendments to the original sentencing guidelines to be submitted to Parliament. Furthermore, the membership of the Judicial Advisory Council should be composed of a majority of trial court judges from all levels of courts of criminal jurisdiction in Canada.

The last clause in the recommendation is intended to ensure that trial judges also have a voice in sentencing policy-making.

5.5.2 Courts of Appeal and Sentencing Policy

Although the Courts of Appeal in certain jurisdictions have begun to issue policy-making guideline judgments, the powers of the court on appeal against sentence are narrowly circumscribed by section 614(1) of the *Criminal Code*. This section provides as follows:

- 614 (1) Where an appeal is taken against sentence the Court of Appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive;
- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or
 - (b) dismiss the appeal.
- (2) A judgment of a Court of Appeal that varies the sentences of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. 1953-54, c. 51, s. 593.

The Commission believes that the role of the Courts of Appeal in formulating sentencing policy should be enhanced and recommends that the

Criminal Code be amended to expand the powers of the Courts of Appeal to include policy-making. Before discussing the recommendation, we shall briefly describe the different ways in which the Courts of Appeal could complement the work of the permanent sentencing commission.

Before the appointment of the American federal sentencing commission, which is required to report on its recommendations in April, 1987, all U.S. sentencing guidelines commissions have been state-based bodies. Unlike the Canadian Sentencing Commission they have not been faced with the problem of achieving a balance between national standards and regional needs. Another frequently-mentioned difference is the existence in this country of a strong appellate tradition which calls for giving to the Courts of Appeal a broader role than simply reviewing the trial courts' compliance with or departure from the guidelines issued by a sentencing commission.

There is a way of achieving a balance between national and regional concerns and between the administrative and the judicial branches which may respect the nature and competence of such bodies as a national sentencing commission and the Courts of Appeal. A national commission has an overview of the general sentencing trends across the country and, being a self-triggering mechanism, it is not dependent upon whether or not a case is appealed to resolve issues. Its proper role is therefore to provide the *initial formulation* of a national policy on sentencing (this last remark applies equally to this Commission).

Courts of Appeal are provincially-based and hence more sensitive to regional needs. Furthermore, their fundamental role has always been to review the fitness of decisions previously made by another body. Reviewing the appropriateness of a policy in the context of a province or territory would seem to be a natural extension of the traditional role of the Courts of Appeal. There would be several ways in which this role could be performed.

a) Reviewing the Fitness of Sentences:

The Courts of Appeal would retain their traditional role of reviewing the fitness of sentences. It has already been said that sentences could be appealed whether or not they depart from the sentencing guidelines. Reviewing particular cases can be accomplished in two different ways. If the case under review is too exceptional to have general implications going beyond its particular circumstances, the Court of Appeal limits its review of the case to an examination of the fitness of the sentence, in the narrow sense. However, particular cases may raise general sentencing issues. For example, the court may indicate that a departure from the sentencing guidelines was not only justified in the case under review but would also be justified in equivalent or comparable cases. Such judgments would actually provide general guidance to the trial courts.

b) Sentencing Guideline Judgments:

Presumptive dispositions and custodial ranges are very far from exhausting the question of providing sentencing guidance. Under the Commission's recommendations, for example, theft over \$1,000 is assigned a qualified presumption of non-custody. The offender is not to be incarcerated unless he has committed a serious instance of this offence and also has a relevant criminal record. It may then be asked: what is the threshold of seriousness beyond which a thief should be incarcerated if he has a relevant record? This threshold can in theory be set at different points which may, for example, be related to specified sums of money (\$5,000, \$10,000 or more).

With regard to the criminal record, there is a problem which has been repeatedly identified but not yet resolved. It is the over-punishment of the persistent petty offender. Should the punishment of such offenders increase with their persistence in committing the same petty offences, or should the sanctions remain proportionate to the offence for which they are actually being sentenced?

Finally, the Commission has noted a general lack of guidance on the appropriate use of the different community sanctions. In what circumstances should one sanction be deemed more appropriate than another?

These are all important concerns, which are also sensitive to the features of the regional context where they may arise, and on which the Courts of Appeal could issue guideline judgments.

c) Amending the Presumptive Custodial Ranges

On any appeal, a guideline judgment by a Court of Appeal providing for a different sentence range because of the existence of substantial and compelling reasons would supersede within a province the custodial range stipulated in the national guidelines. In considering such a guideline judgment the presiding panel of judges would be required to consult all members of the court. The appellate guideline judgment would prevail until re-assessed in an updated version of the national guidelines which would be tabled in Parliament by the permanent sentencing commission and eventually adopted.

Before discussing the possible amendments to the custodial ranges by the Courts of Appeal, it must be emphasized that a Court of Appeal is always at liberty to make representations to the permanent sentencing commission to the effect that a particular custodial range is inadequate. The permanent sentencing commission could then proceed to modify the range if it agreed with the Court of Appeal's representations. The amendment would be submitted to Parliament in the course of the process of updating the guidelines.

Different situations where a Court of Appeal would have recourse to the last resort measure of amending a national custodial range can be illustrated. In one instance, the Court may be convinced that a custodial range provided by

the permanent sentencing commission is not proportionate to the seriousness of an offence, no matter where that offence may be committed. The Court of Appeal would determine a new range, with a view that this amended range would also be adopted in the other provinces, the issue not having to do with a regional concern but with a general requirement on the proper application of the principle of proportionality. This would most likely occur where a guideline in need of updating has not been reviewed in a timely fashion by the permanent sentencing commission.

Other scenarios can be envisaged. Some offences in the *Criminal Code*, such as theft of cattle (s. 298), are influenced by regional concerns in their very definition. In the event that a presumptive custodial range would be determined by the permanent sentencing commission for such offences, it may happen that this range would not reflect the seriousness of the offence. A Court of Appeal may then be compelled to substitute a more appropriate range, being more aware of the actual seriousness of the offence. In doing so, the Court would not really propose that, for instance, the theft of cattle should be more severely punished in a western province than elsewhere. What the Court would be rather arguing is that such thefts occur mostly in a particular region and that they should receive a sanction which is proportionate to their objective gravity.

It is possible that an amendment of the national guidelines by a provincial Court of Appeal would be challenged in the Supreme Court of Canada for being inconsistent with section 15 of the *Canadian Charter of Rights and Freedoms*, which reads as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and the equal benefit of the law without discrimination and, in particular, without discrimination based upon race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The surveys conducted by the Commission have shown that judges and other criminal justice professionals generally believe that there is a significant amount of sentence variation from one province to the other. They were divided on the question of whether such variation is warranted or not. It is the belief of the Commission that its proposals will lessen disparity while allowing the flexibility necessary to address, in compelling circumstances, legitimate regional differences.

11.12 The Commission recommends that the *Criminal Code* be amended to grant explicitly to the Courts of Appeal the power to establish sentencing policy governing the application of sentencing guidelines and, for substantial and compelling reasons to amend the presumptive

custodial ranges determined by this Commission and by its successor, the permanent sentencing commission.

If the outcome of such a recommendation is to transform into a public issue what is now a current practice and result in a pronouncement by the highest court in the country on whether or not regional sentencing disparity violates s. 15 of the *Charter*, this Commission is of the opinion that such a clarification would be highly beneficial for sentencing in Canada.

6. List of Recommendations

- 11.1** The Commission recommends that written reasons be provided every time the judge imposes a sentence which departs from the sentencing guidelines.
- 11.2** The Commission recommends that a sentence, whether it is within the sentencing guidelines or departs from them, can be appealed either by the defendant or the Crown prosecutor.
- 11.3** The Commission recommends that the sentencing guidelines should be tabled in the House of Commons by the Minister of Justice within 15 days of their receipt and would come into effect at the expiry of 90 days unless rejected by negative resolution of the House of Commons. In order to be considered, such a resolution would have to be presented by a minimum of 20 members of the House.
- 11.4** The Commission recommends that the *Statutory Instrument Act* be amended specifically to exclude the national sentencing guidelines from the application of the Act.
- 11.5** The Commission recommends that four presumptions be used to provide guidance for the imposition of custodial and non-custodial sentences:
- unqualified presumptive disposition of custody
 - unqualified presumptive disposition of non-custody
 - qualified presumptive disposition of custody
 - qualified presumptive disposition of non-custody.
- 11.6** The Commission recommends that the presumptive dispositions assigned by the Canadian Sentencing Commission to the offences defined in the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* (Parts III, IV) be adopted as national sentencing guidelines for Canada.
- 11.7** The Commission recommends that the guideline prototypes that it has developed be adopted as providing the basis for the formulation of a complete set of national numerical sentencing guidelines for Canada.

- 11.8** The Commission recommends that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

Aggravating Factors

- 1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.**
- 2. Existence of previous convictions.**
- 3. Manifestation of excessive cruelty towards victim.**
- 4. Vulnerability of the victim due, for example, to age or infirmity.**
- 5. Evidence that a victim's access to the judicial process was impeded.**
- 6. Existence of multiple victims or multiple incidents.**
- 7. Existence of substantial economic loss.**
- 8. Evidence of breach of trust (e.g., embezzlement by bank officer).**
- 9. Evidence of planned or organized criminal activity.**

Mitigating Factors

- 1. Absence of previous convictions.**
- 2. Evidence of physical or mental impairment of offender.**
- 3. The offender was young or elderly.**
- 4. Evidence that the offender was under duress.**
- 5. Evidence of provocation by the victim.**
- 6. Evidence that restitution or compensation was made by the offender.**
- 7. Evidence that the offender played a relatively minor role in the offence.**

- 11.9** The Commission recommends that, in order to facilitate the process of providing explicit justification for departing from the guidelines, the following principles respecting the use of aggravating and mitigating factors be incorporated in the sentencing guidelines:

Identification: when invoking aggravating and mitigating factors, the sentencing judge should identify which factors are considered to be mitigating and which factors are considered to be aggravating.

Consistency: when invoking a particular factor, the judge should identify which features of the factor lead to its application in aggravation or mitigation of sentence. (For example, rather than merely referring to the age of the offender, the judge should indicate that it was the offender's *youth* which was considered to be a mitigating factor or

the offender's *maturity* which was considered to be an aggravating factor. This would prevent the inconsistent use of age as an aggravating factor in one situation and as a mitigating factor in a comparable situation).

Specificity: the personal circumstances or characteristics of an offender should be considered as an aggravating factor only when they relate directly to the commission of the offence. (For example, a judge might consider an offender's expertise in computers as an aggravating factor in a computer fraud case but this principle would preclude the court from considering the lack of education of a convicted robber as an aggravating circumstance).

Legal Rights: the offender's exercise of his legal rights should never be considered as an aggravating factor.

- 11.10 The Commission recommends that time spent in custody before the sentence is imposed should count towards any sentence of imprisonment imposed following conviction. This time shall be credited on a one-to-one ratio with time served after conviction. An offender may earn remission upon time served prior to sentencing.
- 11.11 The Commission recommends the establishment of a Judicial Advisory Committee which would act in an advisory capacity to the permanent sentencing commission, in the formulation of amendments to the original sentencing guidelines to be submitted to Parliament. Furthermore, the membership of the Judicial Advisory Committee should be composed of a majority of trial court judges from all levels of courts of criminal jurisdiction in Canada.
- 11.12 The Commission recommends that the *Criminal Code* be amended to grant explicitly to the Courts of Appeal the power to establish sentencing policy governing the application of sentencing guidelines and, for substantial and compelling reasons to amend the presumptive custodial ranges determined by this Commission and by its successor, the permanent sentencing commission.

Endnotes

- ¹ The seven options were: (i) the present system of guidance from the Court of Appeal in your province; (ii) an informal understanding among judges regarding what an average sentence should be for an offence, based on statistical analysis of current sentencing practice; (iii) a more explicit list of purposes and principles which should be considered by the judge in determining sentence; (iv) an explicit statement or system of weighing the factors to be considered by the judge in determining the sentence; (v) "guideline" decisions which might come from the Court of Appeal of your province, which might state, for example, the appropriate sentence for certain specific types of offences or the minimum "starting point" for particular kinds of cases; (vi) a legislated "presumptive sentence" or range of sentences for the "normal" or "average" instance of a particular offence; (vii) some form of mathematical equation combining a number of different aspects of the case in such a way that each factor is given a specific weight in arriving at a sentence (e.g., a sentencing grid). The formulation of these options may have differed slightly in the questionnaires submitted to judges and other criminal justice professionals but none of these differences were significant. Finally, the list of options was not closed and the respondents were asked to propose any other means of dealing with unwarranted disparity that they may favour.
- ² On this, see among others, the analyses of Robert and Faugeron (1980: 110-120).
- ³ For example the sentences that were imposed on the *Front de libération du Québec* (FLQ) members when they returned from their 1970 exile in Cuba and other countries.
- ⁴ There have been few thorough assessments of court workload. In this regard, the findings of the U.S. Katzenback Commission are often quoted. According to these figures, three judges in Atlanta had to dispose of 70,000 cases in one year; one judge in Detroit had to rule on 20,000 cases in one year. Although the situation may not be as critical in Canada, informal interviews with Canadian judges led to the conclusion that there was in some courts a considerable discrepancy between the small number of sentencing judges and the great number of cases which they had to decide (expeditiously). See *The President's Commission on Law Enforcement and Administration of Justice*, Task Force Report: The Courts. Washington: U.S. Government Printing Office, pp. 29-36.
- ⁵ See Québec (1980). *Rapport: Le vol à main armée au Québec*. Québec: Ministère de la Justice.
- ⁶ In their written comments on the pages of the questionnaires that were sent to judges, this assertion was made in different forms or was implied by other comments on the issue of the individualization of sentences.
- ⁷ This inventory is primarily based on Thomas (1970), Wilkins *et al.* (1978), Blumstein *et al.* (1983), Ashworth (1983) and Grosman (1980).
- ⁸ Roberts (1982), 74 Cr. App. R. 242
- ⁹ Aramah (1983), Crim. L.R. 271
- ¹⁰ Begum Bibi (1980), 71 Cr. App. 360
- ¹¹ Clarke (1982), 1 W.L.R. 1090
- ¹² Johnas (1983), 2 C.C.C. (3d) 490 (Alta. C.A.)
- ¹³ Sandercock (1986), 48 C.R. (3d) 154 (Alta. C.A.)
- ¹⁴ These states are Alaska, Arizona, California, Colorado, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina and Washington State. Needless to say, all these states do not use the same model nor the same format of sentencing guidelines.
- ¹⁵ This attempt was made in the State of Washington. Actually, the Washington Sentencing Guideline Commission announced that it was going to issue guidelines for the exercise of prosecutorial discretion. However, in its final report to the legislature, these guidelines were not fully developed and the Washington Commission decided that this was an area for future work.

- ^{16.} See Knapp (1984; 187)
- ^{17.} Blumstein *et al.* (1983; vol. I, p. 192). See also Galegher and Carroll (1983).
- ^{18.} Blumstein *et al.* (1983; vol. I, p. 193).
- ^{19.} Cohen and Tonry (1983) "Sentencing Reforms and their Impacts" in Blumstein *et al.* (1983; vol. II, pp. 415-417).
- ^{20.} See the Ouimet Committee Report (1969; 212).
- ^{21.} "14.5. Where a prison sentence is imposed, the court should explicitly state and record the purpose of the sentence and the reasons for the sentence". Law Reform Commission of Canada (1977:27).
- ^{22.} See Ashworth (1986: 27-31).
- ^{23.} See Minnesota Sentencing Guidelines Commission (1984). *The Impact of the Sentencing Guidelines*, p. 36.

Minority Report of Commissioner Pateras

With due respect for the opinion expressed by my co-Commissioners, I wish to submit my own views and recommendations concerning the adoption of sentencing guidelines. I shall not mention here which parts of this Report will be affected by my remarks. Unless express mention is made in this minority report or unless there is an obvious incompatibility between my views and those expressed by my co-Commissioners, I subscribe fully to the tenor of the Commission's report.

While I share the view that the Commission's recommendations represent a comprehensive sentencing package for Canada, I believe that the Commission's goals of clarity, consistency and equity in its sentencing policy can be achieved in a manner more compatible to the Canadian judicial context if we do not resort to statutory presumptive guidelines.

Our terms of reference are quite explicit on the issue of sentencing guidelines¹. While we were asked to develop model guidelines for the different categories of offences and offenders, we were also to advise on how best such guidelines could be used in the Canadian judicial framework.

The nature, type and form of sentencing reform must out of necessity reflect the needs of our particular sentencing process. As is stated in the Report:

Many common law jurisdictions are currently reviewing or have already studied ways of reforming the sentencing process. Both the approaches to studying the problems and the solutions which have been recommended and/or implemented vary from one jurisdiction to another. However, the criminal justice system in each jurisdiction studied by this Commission is different from the Canadian System in some fundamental aspects. Many jurisdictions, particularly in the United States where indeterminate sentencing systems prevail, have a history of minimal judicial involvement in the sentencing process. Further, in many of these jurisdictions there is no tradition of sentence appeals. In other countries which have sentence appeals, such as Great Britain, this procedure is only available to the defendant. Consistency in sentencing is no doubt facilitated in Great Britain by the fact that there is only one Court of Appeal whereas in Canada there are ten provincial Courts of Appeal. (Report, Chapter 7, p. 167).

Hence, in searching for answers to the inadequacies of the Canadian sentencing system, we must refrain from resorting to solutions which may be suitable to other jurisdictions but less so to ours.

As our Report indicates, sentencing guidelines can take many forms and be implemented in varied ways. Several American states have opted for legislated mandatory guidelines which impose a sentence grid or range which the judge is bound to follow. On the other hand, the Law Reform Commission of Australia, in its interim report on the Sentencing of Federal Offenders (1981), suggested for consideration the establishment of guidelines which

“...should not be prescriptive ...[but] designed to assist rather than coerce the exercise of judicial discretion.”

The Commission is recommending the adoption of *presumptive* guidelines which would be statutory in nature but which, the Commission states, would not be mandatory in the sense that the sentencing judge would have the discretion to deviate from the adopted range of sentences in appropriate cases. It is with this recommendation in favour of statutory presumptive guidelines (including in/out presumptions) that I register my dissent for reasons which I will now submit.

In reviewing the current situation of sentencing in Canada (Report, Chapter 3), the Commission has focused on the perceptions of disparity. As that analysis reveals, there are different views ranging from those who believe that variations are apparent only to those who consider variations to be real and unwarranted. This has led the Commission to conclude that:

...the disparity which currently exists is due largely to structural problems: judges must work within a framework which allows for considerable discretion *but which fails to provide systematic information on how that discretion is exercised by other judges*. The structure thus fails to provide meaningful guidance about the factors which do and should affect judicial decision-making (my emphasis – Report, Chapter 7, p. 167).

However, the Commission is now proposing an integrated package of sentencing reforms destined to alter *substantially* our present structure. In my view, the improvements to the Canadian sentencing process resulting from the adoption of the Commission’s sentencing package will be so comprehensive, so far-reaching, that there will be no need to fetter the judges’ discretion by the imposition of statutory presumptive guidelines devised and issued by a non-judicial administrative, albeit independent, agency such as a permanent sentencing commission.

A brief review of the Commission’s main recommendations and their expected effect will illustrate how Canadian judges will be provided with new significant guidance about how to exercise their sentencing discretion.

1. *The Declaration of Purpose and Principles of Sentencing* – as the Report explains, our present structure provides no clear policy regarding the imposition of sanctions decreed by our criminal laws.

In the particular field of sentencing, research on disparity conducted on behalf of the Commission has shown that the most frequently alleged cause for unwarranted variation in sentencing was confusion about the purposes of sentencing.

A sentencing rationale supplies the foundation for solutions to unwarranted variation. It is not in itself the final answer to disparity, because, even when it is carefully worded, a declaration of the purpose and principles of sentencing remains a general statement which must be supplemented by more specific guidance to have an impact on practice. There is, however, another function that is performed by a legislated sentencing rationale. It makes known to the community what are the grounds for imposing penal sanctions and the principles governing the sentencing process. (Report, Chapter 6, p. 133)

Apart from the present statutory maxima which are outmoded and of little use in the sentencing process, our legislation provides no meaningful guidance to the sentencing judge. However, if *The Declaration of Purpose and Principles of Sentencing* recommended by the Commission is embodied in the law, our structure will have changed significantly. Judges will be provided with clear principles and priorities to follow and specific factors to apply (see Report, Chapter 6, pp. 153-155). Already a root cause of unwarranted disparity will have been dealt with.

2. *Improved Information Systems* – lack of relevant, meaningful and current data on sentencing by Canadian courts is a major discrepancy of our present system as submissions by the Canadian judiciary have revealed. Moreover, in its published policy statement on sentencing, the Canadian government has stated:

It also seems fair to conclude that there is at present no systematic capacity to provide a defined set of relevant and appropriate information to assist the courts in arriving at sentencing decisions or in evaluating the effectiveness of those sentencing decisions. As will be seen, this conclusion constitutes a common thread running through the reforms proposed by the Government in respect of sentencing.²

We have recommended the creation of a permanent sentencing commission. In my view, its main tasks should be the following:

- 1) to develop a more efficient sentencing reporting system to collect and distribute on a continuous basis information and comprehensive statistics about current sentencing practice;
- 2) to conduct research and studies on all aspects of the sentencing process and to organize seminars and conferences for Canadian judges and other criminal law professionals to discuss, review and disseminate current sentencing data;
- 3) to develop and disseminate *advisory sentencing guidelines*, that is, suggested ranges for specific offences, which would reflect the current sentencing practice.

Under the new structure, in addition to advisory guidelines, courts will have access to more comprehensive sentencing data than is available today. This will provide much needed direction to assist the Courts in arriving at sentencing decisions which properly reflect the statutory sentencing principles and goals.

3. *The Courts of Appeal* – the powers of Courts of Appeal should be enhanced and/or clarified so that they may issue, on a more regular basis, guideline judgments which will set sentencing benchmarks for lower courts to follow.³

Such judicial guidance is current, relevant to the Appeal Court's jurisdiction and results from an appreciation of specific factors. As was stated by the Alberta Court of Appeal in reviewing a drug trafficking sentence:

It is always difficult to compare the factors in one sentencing case with those in another. The personal attributes of the accused and the facts of the offence itself are so infinitely variable that any valid comparison is virtually impossible. Different judges on those facts, each bringing to the case his own lifetime of differing experience, will often disagree. *The best that can be achieved is a range of sentences meeting the needs of a particular part of*

*Canada at a particular time. The Courts must also retain an element of flexibility in sentences to reflect the concerns of society which may differ with the passage of time.*⁴ (my emphasis)

However, the Commission is skeptical about the Appeal Court's capacity to issue timely guideline judgments:

Even if Appeal Courts in all provinces became more involved in writing 'tariff' judgments, the scope of the judgments would still be limited by the nature of the cases heard by the court. Development of policy on a case by case basis is the history of our common law. One of its drawbacks is that if the court wishes to make a pronouncement of principle or range for sentencing cases of break and enter, for example, it must wait until an appropriate break and enter case appears before it. Hence critics have argued that policy should not be left to Courts of Appeal since the disproportion between the number of sentence appeals and the large volume of criminal cases makes it unlikely that Court of Appeal judgments will have a real bearing on the mass of cases decided by lower courts (see Ashworth, 1983). (Report, Chapter 3, pp. 70-71)

I do not share this view as I do not believe that it is necessary for our Appeal Courts to provide ranges or tariffs for all offences. Guideline judgments on such major offences as drug trafficking, robbery, fraud, sexual assault, some types of manslaughter, to name a few, is all that is required since Appeal Court directives will be supplemented by advisory guidelines issued by the permanent sentencing commission.

4. *Reclassification of Offences* – all *Criminal Code* offences will be reclassified in accordance with their objective gravity and will be provided with reduced maximum penalties. Thus, with the exception of murder and high treason, offences which are punishable by life imprisonment will now have a maximum penalty of 12 years or less.

The range of penalty will be restricted, better defined and more realistic. Further there will now be a more explicit choice of custodial and non-custodial penalties. Minimum sentences will be eliminated.

The *raison d'être* of this new approach to criminal sanctions is to provide a more realistic range of sentences and a clearer and more effective direction to the sentencing judge.

5. *Abolition of Full Parole* – parole as it presently exists will be abolished so that a judge will now know that if he imposes a sentence of incarceration, that will be the sentence which the offender will be actually serving. The only reduction will be the last quarter for good behaviour.

As the Report indicates discretionary parole release systems "...introduce a great deal of ambiguity which in turn results in confusion and unpredictability in the sentencing process". (Report, Chapter 10, p. 235). The Commission's proposals regarding the elimination of early release will go a long way in reducing disparity of approach by sentencing judges and in enhancing clarity, predictability and consistency of the sentence from its imposition to its expiration.

As can be seen from this summary of the Report's main proposals, the Commission's comprehensive sentencing package will substantially improve the sentencing judge's resources and provide him or her with meaningful guidance for rendering an appropriate sentence.

Under the new sentencing structure, most of the factors which, according to judges and criminal law professionals, have been the cause of unwarranted variations in sentencing will be eliminated. The guidelines to be issued by the permanent sentencing commission will be similar to those proposed in the Report except that they will simply reflect current sentencing practice and be *advisory* rather than of the statutory presumptive kind.

Obviously, a greater degree of uniformity could be achieved with statutory mandatory or presumptive guidelines but such additional uniformity could only be gained at a substantial cost, namely, interference in the sentencing judge's discretion and a less human and less individualistic type of justice. We need not pay such a price. In cases of truly marked and unwarranted disparity, both the Crown and the accused have recourse to the Appeal Courts for redress.

Advisory Guidelines vs. Statutory Presumptive Guidelines

The Commission has opted for statutory presumptive guidelines* and rejected advisory and mandatory guidelines. I have already said that an agency such as a permanent sentencing commission would disseminate suggested sentence ranges for all offences based on the current sentencing practice in Canada. There is a substantial difference between such advisory guidelines and statutory guidelines be they mandatory or presumptive.

Mandatory guidelines coerce the judge into imposing a sentence within a pre-determined range. They result in greater uniformity of approach but, at the same time, substantially restrict a judge's discretion. In adopting presumptive guidelines, the Commission is endeavouring to assure uniformity of approach in sentencing while at the same time safeguarding a judge's discretion to depart from the guidelines in suitable cases.

However, in my opinion, presumptive guidelines are but a step removed from mandatory guidelines. They both are statutory orders which impose a pre-determined range to the judge. That deviation from the range is permitted in "appropriate" cases upon recording reasons therefore in no way guarantees the continued process of individualized justice which is one of the strong advantages of our judicial system.

As Ruby says:

It would be wrong, in our sentencing system, to make any single factor more important than the principle that the sentence be appropriate to the particular offence and the individual offender. Sensitivity and flexibility in sentencing requires that the approach to be taken should flow from the facts of the case and not from any single rule, however useful or certain that rule may be.⁶

There can be no question that statutory presumptive guidelines import into the sentencing process an element of coercion which restrains and

* See comments on my description of presumptive guidelines as "statutory" in endnote 5.

regiments a judge's discretion in deciding which factors and which ranges to consider in rendering sentence.

However, the Commission suggests that "(t)he requirement that the reason justifying a departure from the guidelines be explicitly stated is the only practical constraint imposed by presumptive guidelines" (Report, Chapter 11, pp. 303-304).

With respect, I cannot agree. The actual restraint imposed by presumptive guidelines is the restriction of a sentencing judge's discretion to impose the sentence (type, range, etc.) which he or she believes is the just and appropriate one for that offence and that offender.

It is because presumptive guidelines are statutory and prescriptive that they are constraining, not because they require that reasons be given to justify a departure therefrom. This requirement (to give reasons) is imposed so that the judge may account for not having restricted his discretion in the manner prescribed by the presumptive guideline.

I also fail to see any relation between presumptive guidelines and the Ouimet Committee recommendation that no sentence of imprisonment should be imposed without an accompanying statement of reasons (Report, Chapter 11, p. 302). While it advocated restraint, the Ouimet Committee recommendation placed no restriction on a judge's discretion to render justice but rather advocated that he should justify his sentence once he, in his full discretion, had decided to impose a term of incarceration.

In view of the fundamental principle of restraint prescribed in *The Declaration of Purpose and Principles of Sentencing* (Report, Chapter 6, pp. 153-155), I would strongly favour an amendment to the *Criminal Code* which would require judges to justify all sentences of *incarceration*.

I fear that presumptive guidelines will dehumanize the sentencing process by introducing a mechanical type of justice. Further the proposed system will allow the intervention of Parliament and/or a statutory body such as a permanent sentencing commission in the sentencing process which has been hitherto the exclusive domain of an objective and independent judiciary.⁷

No one questions that Parliament has the power to intrude in the sentencing process. The issue is whether it should. That it will under the Commission's proposed guideline recommendation is obvious from the Report:

Accordingly, the Commission proposes that Parliament's involvement in the development of sentencing policy should be increased in the following ways: first, Parliament should through the enactment of legislation establish the purpose and principles of sentencing. Second, the House of Commons upon the recommendations of a broadly representative and permanent Commission, independent of government, should issue directives regarding the general distribution of sanctions... (Report, Chapter 7, p. 169).

In discussing the legal status of the proposed presumptive guidelines, the Commission says:

Second is the fact that traditionally the determination of sentences has been, and in the view of the Commission should remain, the responsibility of the judiciary. Accordingly, that is probably the most crucial reason why Parliament should refrain from getting involved in the detailed consideration of sentencing guidelines which are intended to guide the application of the law in particular cases. The proper role of Parliament is to legislate national policy. Public policy is for general application and by its very nature cannot be equally applicable to all cases without relevant interpretation. It runs contrary to tradition that Parliament should determine how the law is to be applied in specific cases. This responsibility with regard to sentencing must rest with the judiciary. In order to maintain the necessary balance of authority in our sentencing process it is important that Parliament set the general parameters and leave to an independent judiciary the application of the policy in individual cases (Report, Chapter 11, p. 306).

With this statement I fully agree. However, I suggest that the intervention in the sentencing process of a “delegated legislative authority”, such as a permanent sentencing commission, which statutorily prescribes “in/out” presumptions and sentence ranges to judges will not result in the Commission’s hoped-for result, that is, leaving the sentencing to an independent judiciary.

For my part, I do not believe that a case has been made for the intrusion of the legislative branch of the government, by itself or by delegation, in the sentencing process.

Further, the Commission states, with reason, that “...no reform of sentencing can be successfully achieved against the explicit will of sentencing judges, who will share the prime responsibility for its implementation” (Report, Chapter 11, p. 292). Yet surveys conducted by the Commission have revealed that Canadian judges as well as Crown and defence counsel reject the *presumptive* guideline solution which the Commission now recommends. The survey results are as follows:

57% of Canadian judges who replied to the Commission questionnaire were opposed to presumptive guidelines⁸

91% of defence counsel

73% of Crown counsel, and

95% of part-time Crown attorneys were also opposed ⁹

I suggest that these results are not difficult to assess. By any yardstick, the figures are striking. They reflect the considered opinion of Canadian judges and criminal law professionals who deal with sentencing on a daily basis and who are true experts in the matter. I cannot agree with suggestions that judges and lawyers prefer the status quo for its sake or that, in some manner, they may be misinformed.

In my brief summary of the reforms advocated by the Commission I have stated that the powers of the Courts of Appeal should be modified so that they may be more accessible for sentencing appeals and so that they may issue

guideline judgments on a more regular basis. The surveys conducted by the Commission reveal that 73% of Canadian judges favour guidance from the Appeal Court.¹⁰

For all these reasons, I believe that advisory guidelines, benchmark judgments from the Courts of Appeal and the extensive reforms which the Commission is advocating will be sufficient to reach the Commission's goals of clarity, uniformity and equity in sentencing.

My views on sentencing guidelines are perfectly reflected in *Sentencing*, the Canadian Government's published policy statement:

In the Canadian context, it would seem that guidelines could most appropriately be conceived of as advisory, forming part of an overall effort to provide judges with a better basis of information on which to determine sentences. The development of 'indicated' sentences, or ranges of sentences, for generally-comparable cases, would not mean that the judge would lose his or her discretion to determine sentence on the basis of the facts of the individual case in question. Instead, a system of guidelines would present the court with an approach based on general sentencing practices and trends, in an attempt to assist in identifying the factors most relevant to the case. The judge would not be bound to follow the indicated guideline sentence. Nor, indeed, should the judge apply the guideline where individual circumstances relevant and appropriate to the case distinguish it from the guideline sentence. All the guidelines would do is provide the court with a structured sentencing aid as a reference point.¹¹

Endnotes

- ¹. The Commission's terms of reference are reproduced in the Report, Chapter 1.
- ². *Sentencing*, policy statement of the Government of Canada, February 1984, page 8.
- ³. Section 614 of the *Criminal Code* states that, on a sentence of appeal, the Court of Appeal shall consider "*the fitness of the sentence appealed against*". Some of our Appeal Courts have chosen to give these words a very restrictive interpretation and, as a result, will not interfere unless it can be shown that the trial judge proceeded on some wrong principle. I prefer the view expressed by Mr. Justice Brooke of the Ontario Court of Appeal who said:

Parliament has given the right to the appellant to appeal from the sentence and imposed the duty upon this Court as the final Court of Appeal in such matters to consider 'the fitness of the sentence'. It has been said the Court should only find the sentence is not fit if it appears that the trial Judge has proceeded upon an error in principle and/or if the sentence is manifestly excessive or inadequate. If it is manifestly excessive or inadequate the trial judge must have proceeded on an error in principle and the opposite *may* be true. There is no scale other than the scales of justice and it is the duty of this Court to re-examine fact and principle and pass upon the fitness of the sentence imposed. In his able argument Mr. Scullion cautions us that we must not interfere simply because had we tried the case we might have imposed a different sentence. On the other hand, one would not interfere if this were not so. (*R. v. Simmons, Allen and Bezzo* (1973), 13 C.C.C. (2d) 65 at p. 72).

An amendment to s. 614 to render sentence reviews more accessible would resolve this ambiguity.

- ⁴. *Regina v. Burchnall, Regina v. Dumont* (1980), 65 C.C.C. (2d) 490 at 502.
- ⁵. My co-Commissioners have expressed the view that my description of presumptive guidelines as "*statutory*" is inaccurate. The Report (Chapter 11, pp. 305-309) describes the legal status of the proposed guidelines.

Presumptive guidelines, says the Commission, are directives. "In order to be more than a mere request for voluntary adherence, a directive must be grounded in legislation (p. 305). To this end, the Commission has opted for a particular procedure for the implementation of its proposed guidelines: they would be tabled in the House of Commons by the Minister of Justice and "...come into effect...unless rejected by negative resolution of the House of Commons." (see recommendation No. 11.3).

In my respectful view a presumptive guideline which is thus implemented is a *statutory instrument* in accordance with the definition of those terms in sub-section 2(1)(d)(i) of the *Statutory Instrument Act*, 1970-71 (Can), c. 38:

... 'statutory instrument' means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established.

- (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates,...

The suggestion by the Commission (p. 309) that the *Statutory Instrument Act* be amended to exempt such guidelines from the scrutiny of a Parliamentary Committee as required by that Act is indicative of the true nature of such instruments. Finally, if they were not statutory would there be any reason for the Commission to raise the issue of "possible abuse of *delegated legislative authority*"?

- ⁶. Ruby, Clayton C., *Sentencing*, 2nd Ed., Butterworths, Toronto, 1980, page 424.
- ⁷. In its submission to the Commission, the Canadian Bar Association emphasizes in its introduction:

It is our belief that the integrity and effectiveness of the sentencing process depends in large measure on the ability of courts to exercise broad judicial discretion with regard to the

penalties imposed on individual offenders. We believe that an independent judiciary is the best protection that the sentencing process will be – and will be perceived as being – appropriate and fair.

- ⁸. Source: Report, Judge's Questionnaire, October 1, 1985, page 96. To the following choice of sentencing guidance:

3e) A legislated "presumptive sentence" or range of sentences for the 'normal' or 'average' instance of a particular offence. (Offences in such a system might be broken down into 'finer' categories than they are in the *Criminal Code*. There could be, then, a number of different categories of offences, such as robbery, which would differ in seriousness.)

The judges replied:

4% This would be the best or one of the best ways of dealing with unwarranted variation in sentences.

20% This would be a useful way of dealing with unwarranted variation in sentences.

19% Under special circumstances it might be a good way of dealing with unwarranted variation in sentences.

15% It would not be a useful way of dealing with unwarranted variation in sentences.

42% It would cause more problems than it would solve.

One of the provincial court judges association in its brief to the Commission stated:

The judges canvassed appeared to be adamant in opposition to presumptive sentences and grid systems. While it is agreed there is need for clear articulation of reasons for sentence, it is generally felt that circumstances of the offence and the offender can vary greatly and can shade into a rather delicate but real nuance with the result that presumptive sentences and grids cannot adequately effect justice in individual cases.

Given that the primary function of the sentencing process is the protection of the public, presumptive sentences and grid systems are simply not sufficiently finely tuned to assist well in achieving that end. It is suspected that what they do is tend to increase jail populations rather indiscriminately and ineffectively given the aims of the criminal justice system.

Another submission from an association of provincial court judges stated that there was "little attraction (38%) for a *legislative presumptive sentence or range of sentences...*".

A third such brief indicated opposition to guideline systems.

- ⁹. Source: Survey of Crown and Defence Counsel, question #9 re: sentencing guidelines.

- ¹⁰. Opinions of Sentencing Judges in Canada: A Report. October 1, 1985, *Highlights of the Judge's Questionnaire*, page (i).

The brief of one of the provincial court judges associations submitted to the Commission stated:

The judges generally believe that the public is best served by the present adversarial sentencing process which is subject to the continuing scrutiny of the Court of Appeal. Equality in sentencing is achievable without sentences being identical. The Court of Appeal is effectively available to rectify erroneous sentencing extremes by flattening out the general flow and providing guidelines in areas of difficulty.

- ¹¹. *Sentencing*, policy statement of the Government of Canada, February 1984, pages 62-63.

Chapter 12

Community Sanctions

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Chapter 12

Community Sanctions

1. Non-Carceral Sanctions: Definition and Scope

The Canadian Sentencing Commission was directed by its terms of reference to investigate and develop separate sentencing guidelines for the use of “non-carceral” sanctions.¹ As a starting point, the Commission wanted to find a generic term for all of those dispositions which did not involve incarceration. It can be argued that the term “non-custodial” satisfies this objective. However, the Commission rejected the traditional reference to non-custodial sanctions on the basis that it does not accurately reflect the Commission’s sentencing policy. The Commission has taken the position that all sanctions imply a deprivation of freedom which runs on a continuum from extreme deprivation (incarceration) to minimal coercion (absolute discharge). The traditional reference to non-custodial sanctions does not accurately reflect this concept as it sets up a dichotomy between custody and all other sanctions. As argued later in this chapter, imprisonment should not be viewed as the pivotal sanction with all other dispositions considered as forms of leniency. Also, the term “non-custodial” may be criticized as being too vague; other than distinguishing these sanctions from custody, it conveys no sense of their nature or character.

In the discussion which follows, the Commission elaborates upon the categorization of sanctions initially addressed in Chapter 5. The Commission has adopted “community sanctions” as a generic term for all sanctions other than custody because it reflects the nature of these sanctions as involving either community programs or resources (e.g., supervised probation) or compensation to the community (e.g., fines). Furthermore, it also connotes that these sanctions are to be served or performed in the community.

To further distinguish amongst these community sanctions, the Commission refers to compensatory and non-compensatory sanctions. One definition of “compensation” given in Webster’s dictionary is “the act or action of making up, making good or counterbalancing.” Several briefs submitted to the Commission (The John Howard Society of Canada, The John Howard Society of Ontario and Citizens for Public Justice) encouraged the Commission

to view sentencing as a means of restoring relationships in the community which have been broken by the commission of a crime. In this context, the payment of a fine to the state, the return of goods through restitution, the payment of monies to the victim for loss or damage, the performance of work for the community pursuant to a fine option program or a community service order are all concrete actions of “compensation”.

This chapter is divided into three parts. The first part enumerates and describes the dispositions considered by the Commission under the heading of “community sanctions”. The second part outlines the Commission’s general policy respecting community sanctions which is one of encouraging their greater use in a principled way². This involves a definition of these dispositions as sanctions in their own right and considers the question of what is meant by their use in a “principled” way. These issues are considered in the context of the current use and effectiveness of community sanctions, problems with these dispositions, consideration of proposals for reform made by previous commissions and committees and by the public, as well as comments offered through public submissions and surveys.

The third part of the chapter makes specific recommendations concerning the assessment and use of fines and restitution and recommends a model for fine default. For reasons discussed later in the chapter, guidance respecting the imposition of these sanctions is given as an illustration of principles which may be enunciated in future.

The following is a list of dispositions considered by the Commission under the umbrella of community sanctions. (Fine option programs and victim-offender reconciliation programs are not sanctions *per se*, but rather support programs of special importance. For this reason they are discussed at this point).

Compensatory Community Sanctions

1. Conditional Discharge (with an order of restitution or community service as part of the probation order).
2. Suspended Sentence (with an order of restitution or community service as part of the probation order).
3. Probation Order (with an order of restitution or community service as part of the probation order).
4. Community Service Order.
5. Compensation Order.
6. Restitution Order.
7. Fine.
8. Fine Option Programs.
9. Victim/Offender Reconciliation Programs (where restitution is involved).

Non-Compensatory Community Sanctions

1. Absolute Discharge.
2. Suspended Sentence (with a probation order which does not include an order for restitution or community service).
3. Probation (with no order for restitution or community service).
4. Victim/Offender Reconciliation Programs (where restitution is not involved).

Three recommendations the Commission has made respecting community sanctions illustrate the degree to which they are integral to its sentencing policy. The Commission has recommended that these sanctions should be considered to be sentencing dispositions in their own right, as opposed to being merely substitutes for incarceration. It has also recommended that greater use should be made of these sanctions, as illustrated by its scheme of presumptive sentencing dispositions. Finally, the Commission has emphasized that the more extensive use of community sanctions can only be effected if federal and provincial governments are willing to provide the funding and resources necessary to make these sanctions viable sentencing options. Given the degree to which the Commission's sentencing policy emphasizes the use of community sanctions, it is appropriate to first consider the individual dispositions embraced by this term and the legislative authority in the *Criminal Code* for their imposition.

1.1 Absolute and Conditional Discharges

In 1956 the Fauteux Committee recommended that provision be made in the *Criminal Code* for "probation without conviction" to be imposed in exceptional circumstances or on first offenders in situations where extreme hardship would result if a conviction were registered (Fauteux, 1956; 15). The basic elements of this concept are similar to those of the current conditional discharge.

The Ouimet Committee further developed the concept of the absolute and conditional discharge as a means by which first offenders charged with minor offences could be sentenced without experiencing the damaging consequences of a criminal record (Ouimet, 1969; 194). The government acted upon the recommendation of the Ouimet Committee by amending the *Criminal Code* in 1972 to provide for these dispositions.³ Subsection 662.1 of the *Criminal Code* stipulates that an offender, other than a corporation, found guilty of an offence, other than an offence for which a minimum penalty is prescribed by law or for which a maximum penalty of 14 years or life is provided, may be subject to an absolute or conditional discharge. In imposing either of these dispositions the court must be satisfied that the use of the sanction would be in the best interests of the accused and not contrary to the public interest. The subsection expressly provides that the imposition of a discharge does not constitute a "conviction". An offender granted a conditional discharge is subject to the terms of a probation order.

1.2 Suspended Sentences

Authors Ekstedt and Griffiths (1984; 54) note that the practice of releasing offenders on their own recognizance by suspending a sentence rather than imposing a sentence was given legal authority in 1889 by the *Act to Permit the Conditional Release of First Offenders in Certain Cases*⁴. This legislation permitted judges to suspend the imposition of a sentence and instead place the offender on “probation of good conduct”. In 1921, a reporting requirement was added to this provision which had been included in the *Criminal Code* of 1892. Prior to 1955, the *Criminal Code* authorized the suspension of sentence only for first offenders convicted of offences punishable by not more than two years imprisonment. For offences punishable by imprisonment in excess of two years, the imposition of a suspended sentence was permitted only with the consent of Crown counsel (Fauteux, 1956; 12). The current *Criminal Code* provisions respecting the suspended sentence were introduced in 1968-69.⁵ The current subsection 663(1) permits the court to suspend the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order, provided the offence is not one for which a minimum punishment is prescribed. In making this order, the court must consider the age and character of the accused. Subsection 664(4) provides that where an offender sentenced to a suspended sentence is convicted of an offence while subject to the probation order which accompanies the suspended sentence, probation may be revoked and the court may impose any sentence which could have been imposed if the passing of sentence had not been suspended.

1.3 Probation

Probation started in Canada in 1889 as conditional release for first offenders who had committed relatively minor offences (Parker, 1976; 91). The *Criminal Code* of 1892 provided that first offenders convicted of offences punishable by not more than two years imprisonment could be released “on probation of good conduct” pursuant to a recognizance.⁶ As authors Ekstedt and Griffiths (1984; 249) note, subsequent legislation in 1921 provided for the supervision of probationers in the community, and during the period from 1921 to 1967, the provinces and territories enacted legislation creating probation services.

The Ouimet Committee made a number of recommendations respecting probation in its report of 1969. However, the concept of probation at the time of that report was different from what it is today. At that time, section 638 of the *Criminal Code* provided that where the court decided that it was expedient for the offender to be released on probation having regard to the nature of the offence, the offender’s age and extenuating circumstances, it could suspend the passing of sentence and direct that the offender be released pursuant to a recognizance. There was confusion about the exact nature of probation since it was to be imposed “instead of sentencing (the offender) to punishment”

(section 648, cited in Ouimet, 1969; 293). The imposition of probation was also subject to a number of restrictions.⁷

The Ouimet Committee recommended that statutory provision should be made for a distinct disposition known as probation and that a probation order should be used in lieu of a recognizance to authorize the offender's release into the community. The Committee further recommended the removal of the restrictions on eligibility for probation relating to the absence of previous convictions (Ouimet, 1969; 295-299). The forerunner to the current section 663 of the *Criminal Code* respecting probation was introduced in 1968-69 and reflects many of the Ouimet Committee recommendations.⁸

At the present time, probation cannot be imposed as a separate sanction. It must be accompanied by one of the following four dispositions: a suspended sentence; a fine; a term of imprisonment not exceeding two years; or an intermittent sentence.⁹ Pursuant to subsection 663(2) of the *Criminal Code*, an offender released into the community on probation must be law-abiding and attend court when required to do so and may, in addition, be subject to one or more additional requirements set out in paragraphs (a) to (g) of that section. For example, the offender may be required to report to a probation officer and/or abstain from consuming alcohol and/or make reasonable efforts to find and maintain suitable employment.

A probation order may not exceed three years in duration.¹⁰ It is to be imposed having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission.¹¹ These conditions reflect the origins of probation as relief from the constraints of incarceration justified on the basis of the offender's age or character or because of the minor nature of the offence. An offender who breaches a probation order is subject to prosecution for the separate offence of breach of a probation order pursuant to subsection 666(1) of the *Criminal Code*.

1.4 Community Service Orders

The community service order emerged during the late 1970s and early 1980s as a solution to the problem of jail overcrowding and a response to the concern that offenders should be subject to better reintegration into the community (Ekstedt, 1986; 23). In its report entitled *Guidelines; Dispositions and Sentences in the Criminal Process*, the Law Reform Commission of Canada recommended provision for community service orders (1977; 23). It characterized the community service order as an alternative disposition for fines. However, taken in the context of all of its recommendations respecting restraint in the use of imprisonment, there is no doubt that the Law Reform Commission envisaged the use of community service orders in lieu of custodial sentences for some offences. The Commission identified an additional objective for community service orders: to achieve reconciliation between the community and the offender by repairing the harm done and by applying a positive form of censure to an offence.

Community service orders are made pursuant to subsection 663(2)(h) of the *Criminal Code* as part of a probation order. That paragraph authorizes the court to compel the offender to "comply with such other reasonable conditions (participation in a community service program) as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences." Typically, a community service order requires the offender to work in a program for a particular number of hours designated by the province as a community service program.

1.5 Victim-Offender Reconciliation Programs

There is no provision in the *Criminal Code* for victim-offender reconciliation programs *per se*. The Commission has adopted the position that opportunities should be made available for willing offenders and victims to reconcile either through mediation or restitution programs. However, because effective reconciliation must be voluntarily undertaken, it is not the kind of program which should be forced upon unwilling parties. Although the Commission recognizes that parties cannot be coerced to reconcile, it proposes that the courts should encourage the use of these programs through sentencing dispositions in appropriate cases. Victim-offender reconciliation programs have emerged in all provinces and territories across Canada except Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick and Alberta (*Ekstedt, 1986*).

These programs are principally of two types: those which divert offenders from the criminal process entirely and those which occur before sentence with the aim of facilitating mediation and restitution between the offender and the victim. One goal of the victim-offender reconciliation programs is to personalize and humanize the criminal justice system (*Ekstedt, 1986; 31*). Where they involve restitution, these programs also encourage the offender to take responsibility for the offence while at the same time providing redress to victims of crime, in appropriate cases, for loss or injury suffered (*Ekstedt, 1986; 31*).

1.6 Compensation

Both compensation and restitution, understood in terms of redressing the victim of an offence for loss or injury suffered, have their common law origins in feudal England. The history of these concepts is explored more fully at the end of this chapter under the discussion concerning restitution.

Prior to the proclamation of the *Criminal Law Amendment Act, 1985*,¹² there were three provisions of the *Criminal Code* which related expressly to compensation. Subsection 388(2) provided that where an accused had been convicted of an offence of wilfully destroying or damaging property, where the amount of the destruction or damage did not exceed fifty dollars, the court

could order the offender to pay to the person aggrieved (victim) an amount not exceeding fifty dollars as compensation. Two additional sections provided for compensation for the commission of indictable offences. Subsection 653(1) empowered the sentencing court to order the offender to compensate the victim for loss or damage to property suffered as a result of the commission of the offence. However, it was necessary for the victim to apply for the order. The offender could also be ordered to pay compensation to a *bona fide* purchaser who had purchased goods in good faith not realizing that they had been illegally obtained. Where the goods had been returned to their original owner, the *bona fide* purchaser could apply for a compensation order pursuant to subsection 654(1) of the *Criminal Code*. The *Criminal Law Amendment Act, 1985* repealed section 388 and modified subsections 653(1) and 654(1) to apply to both indictable and summary conviction offences.¹³ Subsection 653(1) was also modified to delete reference to the damage or destruction having arisen from the commission of the offence “for which the accused is convicted”.¹⁴ The requirement that an application must be made to the court by the “person aggrieved” has been retained.¹⁵

1.7 Restitution

As indicated above, the historical origins of restitution are examined in more detail in the last part of the chapter.

Prior to the enactment of the *Criminal Law Amendment Act, 1985*, the term “restitution” was used to refer to two different concepts: the return of property by the offender to the victim; and the payment of money to the victim for actual loss or damage suffered as a result of the commission of the offence. The former was set out in section 655 of the *Criminal Code* and the latter could be ordered as a term of probation pursuant to subsection 663(2)(e). Pursuant to the *Criminal Law Amendment Act, 1985*, section 655 was repealed and all provisions respecting the return of property obtained by the commission of an offence were included in the new provisions relating to search warrants and the detention of goods seized pursuant to these warrants.¹⁶ The only remaining provision respecting restitution involves a term in a probation order that the offender make financial redress to the victim for injury or damages suffered as a result of the offence. Thus, the *Criminal Code* currently uses two different words to describe financial payment by the offender to the victim. “Compensation” is monetary payment to redress property loss whereas “restitution” is financial reimbursement for either property damage or for physical injury.

1.8 Fines

Subsection 646(1) of the *Criminal Code* provides that an offender who is convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of, any other punishment that is authorized except where a minimum term of imprisonment is specified.

Subsection 646(2) provides that an accused who is convicted of an indictable offence punishable by imprisonment in excess of five years may be fined in addition to, but not in lieu of, any other punishment that is authorized. The amount of a fine imposed on an individual for an indictable offence is at the discretion of the court. Subsection 722(1) provides that a person who is convicted of a summary conviction offence is liable to a fine of not more than \$2,000 and/or to a term of imprisonment not exceeding six months.

The *Criminal Code* also provides for fines to be imposed on corporations in lieu of any other punishment prescribed for the offence.¹⁷ Subsection 647(a) indicates that the maximum amount of the fine which may be imposed on a corporation for an indictable offence is at the discretion of the court and for a summary conviction offence, may not exceed \$25,000. The provision traditionally used to enforce fines against individuals is the imposition of imprisonment in default of payment of the fine pursuant to subsection 646(3). To facilitate the enforcement of fines not paid by corporations, section 648 of the *Criminal Code* permits the prosecutor to file the conviction with the superior court of the province in which the trial was held. Once filed, the conviction constitutes a judgment of the court and is enforceable against the corporation in the same manner as if it were a judgment which had been obtained pursuant to civil proceedings.

1.9 Fine-Option Programs

The *Criminal Law Amendment Act, 1985* amended the *Criminal Code* to provide a legislative basis for the use of fine-option programs in the provinces.¹⁸ These programs enable offenders to work off their fines at a given rate per hour by performing work in the community rather than being imprisoned for fine default. The first fine-option program in Canada was created in Saskatchewan in 1975 and since then a number of provinces have proposed or implemented similar programs (*Ekstedt, 1986; 20*).

The Commission did not have the resources to conduct an exhaustive review of each of the previously listed community sanctions. Indeed, an extensive review of just one sanction, such as probation, could potentially absorb a disproportionate number of the Commission's total resources. Given these restrictions and the Commission's limited time-frame, it was necessary for it to discuss general issues respecting community sanctions and to focus on only a few dispositions. One such sanction is fines.

The Commission has given priority to the use of fines and the issue of fine default for three basic reasons. First, fines are widely used: across Canada (excluding Quebec and Alberta) sentencing judges in 1973 imposed fines in 34.8% of cases involving convictions for indictable offences and in 92.7% of cases involving summary conviction offences (*Verdun-Jones and Mitchell-Banks, 1986; 11*). Second, research indicates great disparity in the lengths of prison sentences served by offenders for the default of fines of equal amounts. For example, some offenders are serving their fines at the rate of \$3 a day,

while others are serving them at the rate of \$70 per day (*Verdun-Jones and Mitchell-Banks, 1986; 9*). Thirdly, the “quasi-automatic” use of imprisonment for fine default has contributed significantly to provincial prison populations and has discriminated against impecunious offenders who are unable, as opposed to unwilling, to pay their fines.¹⁹

In addition to fines, the Commission has also considered the sanction of restitution. The greater use of restitution has been advocated by a number of commissions and committees that have studied sentencing. For example, the Law Reform Commission of Canada, in its 1976 report entitled *Our Criminal Law*, recommends greater use of restitution because it encourages offenders to take responsibility for their actions and also meets the real needs of victims (1976; 25). The Commission endorses this view. It thus has formulated recommendations consistent with the perception of restitution as a viable sentencing option for many offences which has the additional advantage of providing redress for victims of crime. The Commission’s proposals concerning restitution also complement its recommendations respecting fines since the latter address the relationship which should exist between fines and restitution where the offender has limited resources.

2. Community Sanctions

2.1 Reform Proposals

As noted in Chapter 6, the Commission’s sentencing policy involves a shift in emphasis concerning the use of imprisonment. This shift represents the latest development in a continuum of change which has emerged since Confederation. Research undertaken for the Commission notes that from 1867 until approximately 1938, secure incarceration was the primary disposition available to the courts in sentencing (*Ekstedt, 1986; 7*). Humanitarian and economic concerns about the growing prison population coupled with the emergence of the rehabilitative ideal in the late 1930s intensified the desire to develop alternative dispositions (*Ekstedt, 1986; 8*). Chan and Ericson note that while the ideological and legislative groundwork for “decarceration” (involving the concepts of diversion, pre-trial settlement and community corrections) may have been laid in previous decades, the actual state-sponsored policy may not have become fully effected until the 1960s and 1970s (Chan and Ericson, 1981; 5).

In 1969 the Ouimet Committee advocated a reorientation in the use of imprisonment. They recommended that the *Criminal Code* be amended to give statutory guidance to sentencing which encompassed the principles contained in Section 7 of the American Law Institute draft Model Penal Code of 1962 (Ouimet, 1969; 191). The latter basically proposed an emphasis on the use of sanctions other than imprisonment unless a custodial sentence was necessary for the protection of the public.²⁰ Through the vehicle of various background papers, working papers and reports, the Law Reform Commission of Canada

has consistently advocated greater use of community sanctions and more extensive community involvement in sentencing dispositions.²¹ For example, one innovative recommendation of the Law Reform Commission of Canada concerns the establishment of citizens' justice councils in all communities. These councils would perform the following functions: facilitate dispositions involving mediation and arbitration; identify community needs to permit the useful application of community service orders; and assist in those aspects of other sentences which call for support to the victim and the reintegration of the offender (Law Reform Commission of Canada, 1976; 55).

The concept of the greater use of community sanctions for property offences was also supported in the *Criminal Law in Canadian Society* (CLICS). That document indicates that in some cases of property damage, criminal law penalties neither serve the interests of the victim nor restore the social harmony disturbed by the criminal act. As a consequence, there is a growing interest in the use of alternatives to the criminal process in dealing with certain disputes that are more in the nature of civil wrongs between two parties than "real" criminal offences (Canada, 1982a).

The expanded range of sentencing options set out in the proposed Criminal Law Reform Act, 1984 (Bill C-19)²² was premised on the policy of "reversing the widespread, but inaccurate and harmful presumption that imprisonment is the 'normal' or expected sanction, with all other sentences being seen as merely 'alternatives to incarceration' " (Canada, 1984; 34).

2.2 Public Submissions and Opinions

Several groups which made submissions to the Commission suggested that community sanctions should be the norm in sentencing (the John Howard Society of Ontario, the St. Leonard's Society of Canada, the Canadian Association of Elizabeth Fry Societies and the Quaker Committee on Jails and Justice). Numerous other groups voiced their support for the greater use of community sanctions by making specific recommendations concerning individual sanctions. The John Howard Society of Ontario made the following comments in disputing the perception of community sentences as a form of clemency:

All community sentencing options have...a punitive effect. What distinguishes imprisonment from the community sentencing options is not the presence or absence of punishment, but the severity of deprivation of freedom...[W]here imprisonment is not essential for protection, it should be used only as the very last resort. Clear preference should be given to the community sentencing options.

One group (The Edmonton Chamber of Commerce) suggested that the use of community sanctions should be confined to first offenders.

The Doob and Roberts report to the Department of Justice established that it was overly simplistic to assert that the public want harsher penalties

(Doob & Roberts, 1983; 5). In fact, two interesting findings emerged from the second national survey of public opinion conducted for the Commission. Although 61% of the public indicated that sentences were too lenient, they did not necessarily associate harsher sentences with imprisonment. Imprisonment was seen as the most appropriate sentence to ensure protection of the public only for offenders convicted of serious offences. The public defined the latter as offences involving violence. Community service orders and probation orders, on the other hand, were viewed as the most appropriate sentences to ensure protection of the public from minor offenders (Research #2). There was clear public support for greater use of community sanctions in lieu of imprisonment in the latest national survey conducted for the Commission. When asked what direction Government spending should take, the overwhelming majority (70%) of respondents favoured using alternatives to incarceration rather than building more prisons (Research #3).

These views are consistent with the findings of a survey of probation and parole officers in the Atlantic provinces who indicated that imprisonment and probation were the two primary sanctions associated with the protection of the public (Richardson, 1986; 4).

The views of the general public accord with those of inmates canvassed by the Commission. Inmates surveyed in British Columbia were given a list of selected offences and asked to indicate which offences should be given community dispositions. A majority of these offenders advocated the use of community sanctions for the following offences: break and enter, simple assault, impaired driving, bribery, possession of marijuana as well as polluting the environment (Ekstedt, 1985; 33). Offences for which inmates prescribed custodial sentences were murder, arson, sexual assault and trafficking in heroin (Ekstedt, 1985; 33). Seventeen percent of the responses from a national survey of native inmates indicated that the criminal justice system should be creative in offering alternatives to imprisonment through greater use of restitution, reparation and community service orders (Morse and Lock, 1985; Appendix II; 5).

2.3 The Current Use of Community Sanctions

2.3.1 The Constitutional Framework

As is well known, *The Constitution Act, 1867*²³ sets out federal and provincial constitutional jurisdiction respecting criminal law. Subsection 91(27) of the Act grants the federal government exclusive authority for criminal law, including procedure in criminal matters. It is pursuant to this authority that the federal government has enacted the *Criminal Code*. The provinces, on the other hand, have legislative authority for the administration of justice in the province pursuant to subsection 92(14) of the *Constitution Act, 1867*.

The *Criminal Code* sets out the substantive provisions respecting sentences which empower the courts to impose community sanctions such as fines, probation and suspended sentences, etc. These sections contain the criteria which must be satisfied before community sanctions may be imposed and in some cases, expressly outline the procedures and/or sanctions which follow the breach of the sanctions. They do not address the details of the schemes by which these sanctions are administered since such issues fall within the responsibility of provincial governments. Thus, in making recommendations about community sanctions to be imposed for *Criminal Code* and other related federal offences, the Commission has restricted its inquiry and recommendations to general principles respecting the use of these sanctions. It has also made specific recommendations concerning the assessment and use of selected sanctions and a proposed legislative scheme for fine default.

2.3.2 The Current Use and Costs of Community Sanctions

The serious limitations on sentencing data and the difficulty of correlating data from one province to another were discussed at length in Chapter 3. This lack of information relates to both custodial and community dispositions. For example, research undertaken for the Commission indicates that the fine is the most frequently imposed community sanction (*Verdun-Jones and Mitchell-Banks, 1986; 2*). However, despite this fact, there is very little empirical research concerning its use and effectiveness (*Verdun-Jones and Mitchell-Banks, 1986; 18*).

Other research prepared for the Commission indicates that the following steps would need to be taken in order to determine the degree to which community sanctions are used and to assess their costs:

- a. a detailed examination of correctional service budgets of each ministry responsible for correctional services;
- b. within the correctional budgets, a detailed examination of all discretionary funds used to contract services;
- c. for government and contracted services providing multiple programs, special studies estimating the costs attributable to each program;
- d. identification of other government departments providing services to correctional personnel and the corresponding costs of these services;
- e. an estimate of the number of cases handled in each program in order to calculate the unit costs for services in each province; and
- f. the determination of the ratio of the specified services to other services provided by corrections and/or courts (*Ekstedt, 1986; 179*).

It is possible to make general statements about the gross annual cost of incarceration versus supervision in the community. Statistics Canada indicates

a total of 5,883 persons admitted to federal institutions in 1983/84 and 4,731 offenders admitted to federal non-custodial programs.²⁴ Programs other than custody in the federal sphere are not directly comparable to community sanctions because they include persons supervised in the community while on parole or mandatory supervision. Nevertheless, a rough comparison of expenditures incurred for incarceration and supervision in the community shows that total federal expenditures for custodial centres in 1983/84 were 420 million dollars as compared with 28 million dollars for community supervision.²⁵ Thus, the funds spent on incarceration for this time period were roughly fifteen times higher than those spent on community supervision. Correctional Services Canada reports similar findings for 1984-85. The gross annual cost of keeping an inmate in custody is \$40,672 whereas the cost of supervision on parole or mandatory supervision is \$4,508 (Correctional Service of Canada, 1986; 29).

It is also possible to make general statements about the costs of community programs in selective jurisdictions relative to the cost of imprisonment. For example, in Ontario, it has been estimated that the imprisonment of an offender costs approximately \$50.00 per day while supervision through a community service order costs only \$2.35 per day (Polonoski, 1979; 2, cited in *Ekstedt, 1986; 25*). In 1979 in Nova Scotia, a total of 3,123 offenders were admitted to the probation services at an average cost of about \$310 per person. This finding can be contrasted with the average cost of \$2,162 per inmate for the 3,825 offenders detained in provincial institutions during the same period.²⁶

2.3.3 The Effectiveness of Community Sanctions

There are a number of problems in attempting to assess the effectiveness of community sanctions. As a starting point, one may ask what it is that community sanctions are designed to accomplish? Research indicates that the primary objectives of these sanctions have traditionally been tied to imprisonment. The rationale for introducing a number of programs has been to reduce the number of offenders incarcerated and thereby relieve prison overcrowding (*Ekstedt, 1986; 182*). It is now becoming increasingly apparent that community sanctions do not in fact currently have this effect. Studies in different jurisdictions have indicated that while the number of individuals being sent to prison has either remained unchanged or has increased, the numbers admitted to community programs has steadily increased (Hylton, 1981; Polonoski, 1981 cited in *Ekstedt, 1986; 182*). This phenomenon which is sometimes referred to as a "widening of the net" of state control over offenders will be described in greater detail in the discussion of the nature of community sanctions.

The problem of using the reduction in prison populations as a criterion for assessing the effectiveness of community sanctions illustrates a more fundamental question about the purpose and existence of alternative sentencing. As noted above, the use of alternative sentences has been tied to the

concept of imprisonment. Indeed, the use of the term *non-custodial* sanctions graphically illustrates this point. In the literature on community sentencing there is a debate as to whether community dispositions are to be regarded as alternative dispositions imposed in special circumstances where imprisonment is the norm or whether they are to be considered as sanctions in their own right. This issue will be discussed in greater detail under the section dealing with the nature of community sanctions but it is raised here to illustrate the lack of clarity about the objectives of these dispositions (*Ekstedt, 1986*). Confusion about the goals of community sanctions considerably complicates any attempt to evaluate their effectiveness. The bias towards imprisonment in the criminal justice system has caused individual community sanctions to be measured by criteria relevant to imprisonment. There appears to be no history of measuring the effectiveness of one community sanction relative to another; for example, assessing the degree to which a fine can be substituted by a community service order.

One criterion which has been used to measure the success of community sanctions and which reflects the bias towards imprisonment, has been recidivism rates. Commission research indicates that the thrust of corrections after the MacGuigan report in 1977 was towards the reintegration of the offender into the community. The alternative sanctions were the means used to effect this re-integration and were premised on a belief that the solution to recidivism lay in finding the right combination of offender/program/worker that would reform the criminal (Adam, 1977 cited in *Edstedt, 1986*; 185). One serious limitation in comparing the relative ability of custodial and community sanctions to reduce recidivism is that they tend to involve very different clientele. Offenders diverted to community corrections appear to be low risk as compared with those sent or detained in prison (*Ekstedt, 1986*; 183). Thus, the comparison of recidivism rates between institutions and alternatives is most difficult to assess (Sarri, 1981, cited in *Ekstedt, 1986*; 183).

One consequence of the practice of trying to find the right "combination" of programs to reduce recidivism has been the phenomenon of "converging" sanctions. This involves either trading off sanctions one against the other or combining sanctions which have conflicting goals and objectives. When sanctions are traded off one against the other without reference to a national standard, concerns about equity arise respecting whether offenders who have committed comparable offences in comparable circumstances are treated equally. When different goals are assigned to various community sanctions and these sanctions are combined, confusion arises respecting the overall objective of the sentence (*Ekstedt, 1986*; 196).

Another phenomenon which complicates assessments of the effectiveness of community sanctions is the shift to privatization of community-based programs. There appears to be a two-edged sword in this movement. First, concerns have been voiced over the lack of standards in monitoring other private sector programs and over the commitment of these programs to provide adequate supervision of clients. Second, private sector agencies are continually made vulnerable to cutbacks (*Ekstedt, 1986*; 184). Administrative costs

“undermine their dependence and divert their energies away from their main purpose which is to assist offenders” (Sapers, 1985; 16, cited in *Ekstedt, 1986*; 184).

2.3.4 Problems with Community Sanctions

The discussion under this heading will focus on general problems with community sanctions and then on problems respecting selected sanctions.

As noted earlier, the John Howard Society of Ontario contests the perception that all sanctions other than imprisonment are forms of clemency. This view of community sanctions as “soft” or “more lenient” options has generated problems with their credibility as viable dispositions (*Ekstedt, 1986*; 17). The Commission has addressed this problem in its discussion of the nature of community sanctions. In addition, the adoption of proportionality as the cardinal principle in the determination of sentences should dispel the notion that offenders are receiving inordinately lenient treatment when they are given community sanctions. The principle of proportionality dictates that the offender should receive a sentence proportional both to the offence and to his or her culpability. This may be reflected in either a custodial or a community sanction.

The universality of program availability is another problem with community sanctions. Submissions received by the Commission indicated that this is a particularly acute problem in remote and northern communities, especially in native communities. The national survey of sentencing judges (Research #6) indicated that a majority of judges take the availability of programs into account in deciding whether to impose community sentences. Further, a majority of these judges felt that the availability of community programs *should* influence whether these dispositions are given. Eighty-one percent expressed the view that the variation in program availability from one community to the next creates sentencing disparity. The development of programs in all communities is essentially a question of government commitment to provide necessary resources to encourage alternative sentencing.

The Nielsen Task Force Report²⁷ recommended that the Government initiate programs to reduce the use of incarceration in sentencing. If the Government is serious about its commitment to do so and wishes to make these programs viable programs in their own right, then it must provide the necessary financial support.

12.1 The Commission recommends that the federal and provincial governments provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use.

Another general problem with community sanctions concerns the flow of information between the judiciary and corrections personnel involved in the

administration of these sanctions. Research undertaken for the Commission indicated some lack of familiarity by corrections personnel with fine-option programs and victim-offender reconciliation programs (*Ekstedt, 1986; 109*).

Communication of viable community options to the judiciary would appear to be necessary to permit judges to make informed decisions which have clear sentencing objectives. Corrections personnel consulted indicated their frustration with the failure of sentencing judges to specify the objectives of a particular sentence.²⁸

The Commission thus makes the following recommendations respecting the need to establish lines of communication between sentence administrators and the judiciary as well as the mechanisms to effect this goal:

- 12.2 The Commission recommends the development of mechanisms to provide better information about sentencing objectives to sentence administrators.**
- 12.3 The Commission recommends that a transcript of the sentencing judgment be made available to the authorities involved in the administration of the sentence.**
- 12.4 The Commission recommends that court officials, corrections personnel and other sentence administrators meet and discuss the parameters of authority in criminal justice administration, sentencing objectives and other issues in sentencing.**
- 12.5 The Commission recommends the development of mechanisms to provide better information about alternative sentencing resources to the judiciary.**
- 12.6 The Commission recommends that feedback to the courts regarding the effectiveness of sanctions be provided on a systematic basis.**
- 12.7 The Commission recommends that prior to imposing a particular community sanction, the sentencing judge be advised to consult or obtain a report respecting the suitability of the offender for the sanction and the availability of programs to support such a disposition.**

The latter recommendation represents a somewhat expanded version of a provision in the Criminal Law Reform Act, 1984 (Bill C-19) which proposed that prior to the imposition of an intermittent sentence, the court should be required to obtain a report from the Attorney General outlining the availability of facilities in the province for the enforcement of the order. That proposed legislation also provided that where an assessment was made in a pre-sentence report respecting the offender's suitability for a community sanction, the report should indicate the programs, services or resources available to give effect to the sanction.

It is impossible to make universal assessments about the effectiveness of individual community sanctions in view of research undertaken for the

Commission which indicates variation across the country (*Ekstedt, 1986*). Some of the problems associated with particular programs will be highlighted and contrasted with the features of more successful programs in other areas.

The collection and enforcement of restitution orders were two problems associated with the restitution program in the Yukon. In contrast, the Saskatchewan restitution program, which began in 1983 and was implemented in conjunction with the sentence of probation, has been very successful. Enforcement, monitoring and collection are facilitated by a number of features of the program: restitution is paid to and disbursed by the courts (court services have extensive experience in record-keeping and handling funds); offender follow-up and enforcement of orders is the responsibility of probation services; and six program co-ordinators are responsible for restitution assessment reports, monitoring offenders, enforcing orders, program information and victim services. They are also responsible for maintaining close contact with other members of the criminal justice system to ensure their co-operation for effective enforcement (*Ekstedt, 1986; 111*). Research indicates high victim satisfaction with the program (75%) (*Ekstedt, 1986; 111*).

A survey of probation officers in Atlantic Canada identified a number of problems with probation. One of the most pressing problems in these provinces concerned the huge caseloads carried by probation officers, which ranged from 80 cases in Nova Scotia to over 100 cases in Newfoundland (*Richardson, 1986; 7*). Most of the probation officers canvassed (67%) felt that their caseload did not permit them to give effective supervision. Because the conditions of probation are set by the court and by the risk-need classification which specifies which probationers are to receive maximum, medium or minimum supervision, probation officers felt that they had little discretion in deciding how often to see a particular client (*Richardson, 1986; 9*). It is interesting to note that 63% of the judges canvassed across the country indicated that the quality of the supervision of community sanctions either "definitely" or "probably" affected their willingness to assign particular community dispositions (Research #6). Similar research undertaken in Quebec for the Commission revealed that only 30% of probation officers believed that their caseloads permitted them to give effective supervision. Forty-two percent expressed reservations about the utility of the supervision that they were able to provide. Twenty-eight percent believed that their caseloads did not permit them to give effective supervision at all (*Rizkalla, 1986; 136*).

The probation officers in Atlantic Canada indicated consensus about two matters. First, probation works for a large category of offenders (success being measured by lack of recidivism). This success was attributed to the fact that probation officers saw their principal role not as supervisors or counsellors but as directors, channelling offenders to relevant community agencies for assistance.

A second area of consensus is that judges tend to misuse the probation alternative. Probation officers indicated that some judges grant probation to inappropriate clients, defined as those who have abused probation opportunities in the past. Other judges use probation, they suggested, not as an alternative to

imprisonment but as another form of punishment. The probation officers surveyed expressed the view that onerous probationary terms were being imposed on offenders who probably should have received a fine or a few days of community service work. These probation orders included conditions such as curfews and abstinence from alcohol which, they indicated, were difficult to enforce and merely led to contempt for the whole process (*Richardson, 1986; 11*).

The Commission's recommendation for greater government commitment to the development and financing of community dispositions would help to alleviate the unmanageable workloads of probation officers in some jurisdictions. The appropriate use of probation would be facilitated by two of the Commission's recommendations: the development of principles respecting the imposition of individual community sanctions (which follow); and its statement of the purpose and principles of sentencing.

In its submission to the Commission, the Native Counselling Services of Alberta noted the problem of over-representation of natives in the criminal justice system. For example, statistics indicate that a disproportionate number of native offenders are incarcerated for fine default (Joint Study of the Government of Canada, Government of Saskatchewan and the Federation of Saskatchewan Indian Nations, 1985; 41). The Native Counselling Services of Alberta recommended that greater use should be made of community sanctions for native offenders. Of special mention were: the use of lay judges and of traditional native practices such as mediation by respected community members and services to victims. The brief indicated two reasons for services of this nature: disparity in the availability of alternative programs in remote and northern communities; and the failure of existing alternative programs to reflect native values and community involvement.

The greater use of mediation by native peacemakers was recommended by a joint study of the Federal Government, Provincial Government of Saskatchewan and by the Federation of Saskatchewan Indian Nations.²⁹ Peacemakers are defined as individuals or community groups or organizations acting as impartial third parties in conflict resolution within the community. Emphasis is placed upon restoring relationships and reducing tensions (p. 29). Research undertaken for this study indicated that the current use of peacemakers in non-court mediation has been very successful (p. 33). In light of this, the study concluded that the use of peacemakers should be promoted and their services should be augmented by additional programs including public legal education, victims' assistance and liaison with the formal legal system (p. 33).

2.4 A Policy Statement

2.4.1 Greater Use of Community Sanctions

In the development of sentencing guidelines for the use of non-carceral sanctions, the Commission was directed by its terms of reference to consider

the statement of purpose and principles set out in the federal government's criminal law policy published in the *Criminal Law in Canadian Society* (CLICS). One principle from CLICS which the Commission has adopted in one of its cardinal principles of sentencing concerns restraint; that is, because the emphasis in sentencing should be on the accountability of the offender rather than on punishment, a sentence should be the least onerous sanction appropriate in the circumstances. As indicated in Chapter 7, the Commission has also considered the issue of restraint in the context of prison overcrowding. In doing so, it has focused on the humanitarian and justice aspects of restraint in applying this principle to its sentencing policy.

Two additional sentencing principles enumerated in CLICS which have been incorporated in the Commission's recommended Declaration of Purpose and Principles of Sentencing are:

In applying the principles contained in (a), (b) and (c), the court may give consideration to any one or more of the following:

- iv) providing for redress for the harm done to individual victims or to the community;
- v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

Principle (iv) encompasses redress for harm done either to an individual or to the community at large which may be effected *inter alia* through the sanctions of restitution and community service orders, respectively. Principle (v) recognizes the continuing importance of developing alternatives which may assist in the rehabilitation or re-integration of the offender into the community.

It can be seen from the foregoing principles that the greater use of community sanctions is inherent in the Commission's sentencing policy itself. The emphasis on offender accountability rather than on punishment, coupled with principle 4(c)(v) of the Declaration which restricts the circumstances in which a term of imprisonment may be imposed, clearly indicates a move towards the greater use of community dispositions. This shift away from incarceration as the pivotal sanction in sentencing is given concrete application by the Commission's proposed presumptive dispositions. As mentioned earlier in Chapter 11, a presumptive disposition has been assigned to every offence in the *Criminal Code*. Four presumptive dispositions are indicated: an "in", an "out", a "qualified in" and a "qualified out". The greater use of community sanctions is implied by the policy embodied in the presumptive dispositions that certain offences which currently attract custody, such as theft or forgery of a credit card, should now presumptively carry a community disposition.

As indicated earlier, the greater use of community sanctions, particularly for property offences, has been supported by various reform bodies and by public opinion as expressed in public opinion surveys. The use of community sanctions as true alternatives to incarceration in appropriate circumstances was embodied in the sentencing package in the Criminal Law Reform Act, 1984 (Bill C-19). The sentencing provisions of that Bill proposed that current

community sanctions should be expanded and imposed as sanctions in their own right. The principal changes proposed by the range of sanction provisions of the Bill as described in *Sentencing* are set out below:

A broader and more clearly defined range of sentencing options would be provided for the court by bringing together and rationalizing current provisions. Within this range of sentencing options, emphasis would be given to non-custodial sanctions, with imprisonment reserved for cases where such non-custodial sanctions are inappropriate. The provisions would also expand or create sanctions to allow for tough and effective penalties to be imposed without having to resort to imprisonment. In addition, increased emphasis and legitimacy would be given to victims' concerns through wider and higher priority use of reparative sanctions such as restitution and community service orders. The clarification, consolidation and expansion of the restitution provisions would constitute a major change in emphasis in criminal sentencing (Canada, 1984; 31).

The Commission fully endorses the direction initiated in Bill C-19 toward the development of community sanctions as independent sanctions. In the course of its research, the Commission became aware of other proposals which may warrant further study. For example, the use of electronic devices to monitor the movement of offenders is being considered in Ontario and Alberta. The Alberta pilot project, which was expected to commence in the fall of 1986, would be directed to offenders who otherwise would be incarcerated or for offenders who would be eligible for temporary absence passes (*Ekstedt, 1986; 128*). A similar concept is being studied in Quebec involving the detention of offenders in their homes pursuant to house arrest (Québec, Ministère du Solliciteur général, 1986). Another proposal has been put forward by a number of probation officers in British Columbia to provide intensive supervision for high-risk offenders. A recommendation by a probation officer to be involved in the program would precede an assessment in a pre-sentence report respecting the offender's suitability for the program. If the offender agreed to become involved in the program and was found to be a suitable candidate, he would be released into the community and subject to intensive supervision. Intensive supervision programs, electronic monitoring devices and house arrest are being proposed as alternatives to incarceration *per se*. As the Commission will attempt to illustrate in the next part, programs such as electronic monitoring and house arrest are particularly vulnerable to the "widening of the net effect" discussed below.

The Commission's recommendation for the greater use of community sanctions and for their further development by a future body should not be construed as an attempt to increase the number of offenders subject to sentencing dispositions. The concern about the extension of penal control over offenders is addressed later during the discussion of the nature of community sanctions.

The Commission makes the following recommendation:

12.8 The Commission endorses the general policy in the Criminal Law Reform Act, 1984 (former Bill C-19) that community sanctions be

developed as independent sanctions. The Commission recommends that the federal government enact legislation which reflects the sentencing proposals in the Criminal Law Reform Act, 1984 (Bill C-19). The Commission further recommends that additional proposals be examined by the permanent sentencing commission and by the federal and/or provincial governments for further review, development and implementation.

2.4.2 The Widening of the Net Effect

Reference has already been made to the necessity of defining the nature of community sanctions. This issue involves a question of whether community sanctions are to be viewed as independent sanctions (sanctions in their own right) or whether they are to be viewed as alternatives to incarceration. The difference in these two perspectives relates to the criteria used to measure the success of these dispositions and a determination of their appropriate use. For example, the traditional view has been that community sanctions are substitutes for incarceration and thus are to be used in situations where incarceration would otherwise be imposed. As such, the criteria used to measure their success have often been standards relevant to imprisonment, e.g., the degree to which they reduce prison costs or offender populations. The Commission is opposed to the indiscriminate application of principles relevant to custody to assess the merits of community sanctions. In the Commission's view, it is inappropriate to evaluate a community service order or a restitution order solely in terms of their impact on the reduction of crime. In addition, it is useful to measure the degree to which restitution orders address the needs and interests of victims of crime or the extent to which community service orders assist the offender in maintaining his or her social and economic ties with the community. The use of criteria which do not relate to incarceration to evaluate community sanctions is consistent with the definition of the latter as independent sanctions. The Commission makes the following recommendation:

12.9 The Commission recommends that community sanctions be defined and applied as sanctions in their own right.

Indeed, the Commission's support for this position is illustrated by its scheme of presumptive dispositions which include presumptive "out" and "qualified out" sentencing determinations.

However, if the Commission were to simply recommend that community dispositions should be viewed as sanctions in their own right, it would not address the important issue of the use of community sanctions to broaden the scope of penal control over Canadian citizens. This phenomenon is often referred to in the literature as the "widening of the net effect".

A widening of the net of penal control is liable to occur when a new sanction is introduced with the intention that it should be used in lieu of another sanction, which is *more severe*. Let us imagine, for purposes of illustration, that 40% of dispositions result in incarceration and that the

remaining 60% result in probation. If a new sanction such as house arrest is introduced as an alternative to the more severe and more costly sanction of incarceration, the expectation is that its introduction will reduce recourse to incarceration. This intended result is illustrated by the following diagrams which depict an anticipated 10% decrease in the use of incarceration.

a) Starting point

| | |
|--------------------|----------------|
| Incarceration: 40% | Probation: 60% |
|--------------------|----------------|

b) Intended result: a reduction of incarceration

| | | |
|--------------------|-------------------|----------------|
| Incarceration: 30% | House arrest: 10% | Probation: 60% |
|--------------------|-------------------|----------------|

The arrow in diagram b) demonstrates the reduction in the use of imprisonment which is anticipated by the introduction of house arrest. However, general research about the introduction of alternative community sanctions has shown that the expected reduction in the use of the more severe sanctions does not usually follow from the introduction of a new, less severe substitute sanction (Cohen, 1985; 44-49). Considered in the context of our illustration, this means that the percentage of offenders receiving terms of imprisonment would remain constant. However, 10% of offenders who currently received probation would now be subject to house arrest which is a more severe disposition than probation. As illustrated:

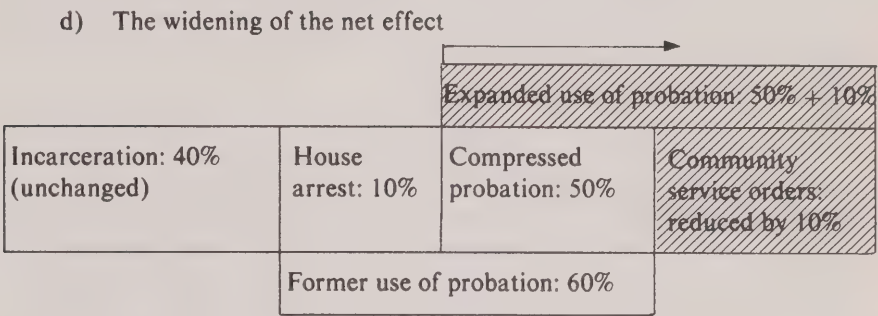
c) Actual result: a compression in probation

| | | |
|--------------------|-------------------|----------------|
| Incarceration: 40% | House arrest: 10% | Probation: 50% |
|--------------------|-------------------|----------------|

The net result of the introduction of house arrest would not be a decrease in sanction severity but an increase due to the percentage of probationers who would receive house arrest in lieu of probation. It is also possible that an offender may be subject to both of these restrictions on his or her freedom: the offender cannot leave his or her home and is supervised occasionally by a probation officer. The direction of the arrow in diagram c) is intended to indicate that, contrary to the original intention, it is the less severe sanction of probation which is diminished by the introduction of the more severe sanction of house arrest.

Unfortunately, the process does not stop at this point. Although 10% of the offenders who normally would receive probation will now be placed under house arrest, there is no real decrease in the overall use of probation. Hence,

the “missing” 10% of probationers will be recruited from amongst those offenders who used to receive the less severe sanction of a community service order. This process is similar to tumbling dominos which fall in the direction of the most severe to the less severe sanctions. The last domino falls into the arena of those offenders who previously were diverted from the courts entirely and thus received no penal sanction at all for their criminal transgressions. This progressive intrusion of penal sanctions into civil life is what is properly called the widening of the net effect. It may be illustrated as follows:



The widening of the net effect is evident from a comparison of the relative use of probation and incarceration in Ontario and Quebec. One study found that although courts in Ontario impose terms of probation four times more frequently than those in Quebec, this has not resulted in a concomittant reduction in the use of imprisonment in Ontario (Ministère de la Justice, Québec, 1981; 132, cited in *Pires, 1986; 136*).

A recent meeting of Commonwealth Correctional Administrators from England and Wales also noted the limited ability of community sanctions to reduce the use of custodial sentences:

The various alternatives to imprisonment could “bite” only at the bottom segment of the prison population, i.e. at the short sentences; thus the effect on total numbers incarcerated can only be limited...the use of community service orders may have been more an alternative to the fine rather than an alternative to imprisonment.

(Commonwealth Correctional Administrators, 1985; 11).

The Commission is of the view that the widening of the net effect can only be contained by adoption of a policy which represents a fundamental shift in the perception of community sanctions. The traditional emphasis in sentencing has been on incarceration as the pivotal sanction, as illustrated by use of the term “non-custodial” to describe community sanctions. However, the Commission’s scheme of presumptive dispositions reflects the policy that imprisonment has been excessively and inappropriately used. To reverse the disproportionate use of incarceration, the Commission has presumptively assigned “out” and “qualified out” designations for a number of offences, many of which currently result in custodial sentences. In this context,

community sentences are being used as “alternatives” to incarceration in the sense that they are more appropriate dispositions than custodial sentences for these offences.

The use of community sanctions as substitutes for incarceration, as opposed to additions to it, was acknowledged in one study conducted in Quebec. This report concluded that too often in the past, reforms attempting to be *alternatives* to incarceration have ended up expanding the reach of custody. These researchers have thus recommended that alternative solutions to incarceration must be substitutes for, rather than additions to, existing measures (Ministère de la Justice, Québec, 1981; 132 cited in *Pires, 1986*; 135).

The policy re-orientation inherent in the Commission’s approach to community sanctions is appropriate for a number of reasons: it accords with the Commission’s emphasis on the principle of proportionality. As indicated earlier, public concern in sentencing focuses primarily on violent offences. The use of community sanctions for property offences is supported in both the public opinion polls and in the briefs submitted to the Commission. Second, an emphasis on the use of community sanctions for a greater number of offences also accords with the Commission’s commitment to the principle of restraint. Finally, this approach complements the Commission’s sentencing principle that the sentence should be the least onerous sanction appropriate in the circumstances. To the greatest extent possible, the offender’s social and economic ties with the community should be maintained. There would appear to be no social benefit to imposing sanctions for lesser offences which disrupted those ties and thereby hindered rather than enhanced the offender’s opportunity to resume a normal life in future.

The Commission proposes that one concrete way to reduce the likelihood of the criminal justice system intruding further into civil life is to develop guidelines based upon the above-noted policy that community sanctions must be considered as sanctions in their own right which, for a greater number of offences, are to be used in lieu of incarceration.

The Commission has invested its time and resources in addressing the pressing issues raised by incarceration and could not attend to the more detailed aspects of the development of guidelines for community sanctions. However, the Commission sees the development and implementation of such guidelines as the ongoing task of a future sentencing body (e.g., a permanent sentencing commission). These guidelines particularly relate to two issues: a further refinement of the imposition of custodial as opposed to community sanctions (the “in/out” decision) and additional guidance respecting the appropriate circumstances for the use of a particular community sanction relative to other sanctions. The Commission anticipates that the latter type of direction would discourage the substitution of one type of community sanction for an inappropriate alternative.

The Commission is of the view that there is no inconsistency in maintaining that community sanctions should be considered as sanctions in their own right and at the same time arguing that for many offences, they should also represent alternatives to incarceration. If community sanctions are considered to be sanctions in their own right, then the criteria used to measure their use and success will no longer be imprisonment-oriented. This approach is complemented by the Commission's recommendation respecting the greater use of community sanctions which is premised on the policy that for many offences, they are the most appropriate dispositions available. In this sense, they truly represent alternatives to incarceration.

2.4.3 Greater Use in a Principled Way

The Commission has indicated that its policy respecting community sanctions is to encourage their greater use in a principled way. The reference to a "principled" approach does not *per se* imply statutory rules and guidelines. It does imply, however, a consistent, reasoned approach to how these sanctions are perceived and evaluated. This relates very directly to a common understanding of their basic nature and purpose. In its discussion of the nature of community sanctions, the Commission has clarified that it means to define these sanctions as sanctions in their own right. In the course of doing so, it has proposed a re-orientation in policy for the use of imprisonment and, within that framework, has indicated that community sanctions should be used in appropriate circumstances. The latter embraces the determination of when community sanctions should be considered as true alternatives to incarceration and when they should be considered as independent sanctions. However they are defined, community sanctions should not attempt to resemble incarceration by attracting conditions which are so arduous that they approximate the degree of constraint implied by custody. They must be viewed as sanctions which, in many cases, are more appropriate than incarceration because they are proportionate both to the gravity of the offence and the degree of responsibility of the offender.

The interpretation of a "principled way" as indicating a general approach and definition of community sanctions should not, however, be seen to preclude the development of guidelines respecting the use of individual community sanctions. Time and resource constraints have prevented the Commission from entering this arena in any detail. Its recommendations respecting fines and restitution are offered as initial steps in the development of more detailed guidance respecting the use of community sanctions. This path is one which may well be pursued by a future body, such as a permanent sentencing commission.

There would appear to be judicial support for more detailed guidance respecting the imposition of community sanctions. A national survey of sentencing judges conducted for the Commission indicated that 56% of judges canvassed supported some form of guidelines concerning the type and severity

of community sanctions which should be imposed when a custodial sentence is not given. These judges also indicated that, as a general approach, these guidelines should have national as opposed to local application (Research #6).

12.10 The Commission recommends that specific guidance be developed, either by the permanent sentencing commission or by a body specifically mandated to study this issue, respecting when particular community sanctions should be imposed.

One goal in recommending that guidelines be developed for the imposition of individual community sanctions is to promote uniformity of approach in the application of these sanctions and to thereby ensure equity amongst offenders convicted of comparable offences in comparable circumstances. Research undertaken for the Commission indicated disparity in the programs available in different communities (*Ekstedt, 1986; 196*). In the absence of universal access to community dispositions, there is a need for a mechanism to equate sanctions. Thus, where a particular sanction was not available in one community, the court could impose a comparable sanction, e.g., substitute a fine for a community service order.

A mechanism to equate community sanctions would also address the current problem of “converging” sanctions whereby dispositions with conflicting objectives are imposed together in one sentence. The overall purpose of the sentence thereby becomes confused and complicated (*Ekstedt, 1986a; 1*).

Research conducted for the Commission on community sanctions recommended that the above-noted concerns respecting equity and the problem of convergence of sanctions can best be addressed by the development of a table of equivalences. This table would be constituted of a cohesive set of tariffs specifying how many dollars in a fine equals how many hours in a community service program. Availability of programs would also be addressed (*Ekstedt, 1986a; 1*). The Commission supports the proposal but did not have the necessary time and resources to develop the concept in detail. The idea is worthy of further consideration.

12.11 The Commission recommends that the permanent sentencing commission consider the feasibility of developing criteria and principles which permit the comparison of individual community sanctions and which attempt to standardize their use (e.g., X dollars is the equivalent of Y hours of community service).

A question related to the further development of guidance respecting the imposition of community sanctions is a determination of the balance of authority between the judiciary and administrative personnel concerning the imposition and execution of community sanctions. One study undertaken for the Commission noted that for the most onerous sanction, imprisonment, the judiciary have the least control over the way in which this sanction is executed, whereas for less intrusive sanctions, such as community sanctions, the judiciary

have greater control in specifying conditions and placement (*Ekstedt, 1986; 191*). The question of the balance of authority between the judiciary and correctional or administrative personnel is concerned with the degree to which the authority of either of these groups is diminished or augmented in future.

A survey of judicial and corrections personnel indicated satisfaction with the court being primarily responsible for the details of the sentencing decision. These same professionals indicated that the sentence administrators in corrections or the private sector should have major control over the manner in which the sentence is carried out (*Ekstedt, 1986a; 107*). The study did indicate a definite lack of awareness of available community sanctions by court officials (*Ekstedt, 1986a; 107*). The Commission is of the view that this finding necessitates the development of mechanisms to keep the court informed of available community sanctions but does not justify shifting primary control over these sanctions to administrative or corrections personnel.

12.12 The Commission recommends that the judiciary retain primary control over the nature and conditions attached to community sanctions.

This recommendation should be considered in conjunction with the Commission's recommendations respecting the need for the flow of information between the judiciary and sentence administrators.

Issues pertaining to the balance of authority between the judiciary and sentence administrators apply as well to tensions between the judiciary and corrections personnel in the execution of carceral sentences. As indicated in Chapter 10, the Commission has defined corrections to include degrees of incarceration and thus such programs as temporary absence passes and open custody facilities have not been considered by the Commission in its discussion of community sanctions. However, consistent with its position that a sentencing policy must integrate different components of the criminal justice system, the Commission recommends that the future review of the balance of authority between the judiciary and corrections personnel involved in the administration of sentences should include not only community sanctions but also correctional programs or release mechanisms which affect the manner in which custodial sentences are served.

12.13 The Commission recommends that the permanent sentencing commission include in its review of community sanctions both those dispositions imposed by the judge at the time of sentencing and administrative programs in the custodial setting which affect the degrees of incarceration to which an inmate is subject.

Having discussed general issues pertaining to community sanctions, the text which follows considers the specific community sanctions of fines and restitution.

3. Fines

3.1 Greater Use

As indicated in the first part of this chapter, the Commission has taken the position that greater use should be made of community sanctions. The imposition of a fine alone is currently restricted by subsection 646(2) of the *Criminal Code* which prohibits the imposition of a fine in lieu of any other *punishment* authorized by law where the accused is convicted of an indictable offence punishable by a term of imprisonment in excess of five years. As noted in Chapter 7, sentencing judges have developed the practice of imposing the fine in conjunction with a custodial sentence of one day to circumvent the restrictions of the provision. In view of reference to the term “punishment”, some courts have held that it is appropriate to impose another sanction, such as probation, in conjunction with the fine.³⁰

Both the Ouimet Committee and the Law Reform Commission of Canada³¹ have recommended removing statutory limitations on the imposition of fines. The proposed subsection 659(1)(a) of the Criminal Law Reform Act, 1984 (Bill C-19) would have empowered the court to impose a fine either alone or in conjunction with another sanction. The Commission takes the position that it is inconsistent to adopt a policy of greater use of community sanctions in appropriate cases on the one hand but to maintain a statutory restriction on the imposition of a particular sanction on the other.

12.14 The Commission recommends that the *Criminal Code* be amended to permit the imposition of a fine alone even for those offences which are punishable by a term of imprisonment of more than five years.

In view of the Commission’s proposed amendments to the penalty structure and its scheme of presumptive dispositions, it is necessary to indicate how the above recommendation should be translated into the Commission’s sentencing regime:

12.15 The Commission recommends that fines be available for all offences (except life sentences) regardless of the maximum penalty provided and in spite of the fact that some offences would have presumptive “in” designations. Where the imposition of a fine would constitute a departure from the presumptive disposition, it should be justified with reasons.

3.2 Guidance

3.2.1 The Imposition of a Fine

At present, the *Criminal Code* does not give specific guidance respecting the circumstances in which a fine should be imposed. Further, with the exception of summary conviction offences and some driving offences, the *Code*

gives no guidance to judges concerning the minimum or maximum amounts of fines to be ordered.

As indicated in the first part of this chapter, the Commission's reference to the use of community sanctions in a principled way does not *per se* imply a detailed legislative scheme of rules respecting the use of individual sanctions. However, the Commission has not intended by this approach to preclude the development of general principles to guide sentencing judges in the exercise of their discretion respecting the selection and assessment of individual community sanctions.

Pursuant to this position, the Commission has formulated two recommendations respecting the appropriate circumstances for the imposition of a fine. These recommendations are premised on two policies: the use of the fine is to be encouraged because of its relative advantages as a sanction; and the fine is one of the most onerous of all of the community sanctions available. The Commission recognizes the difficulty of comparing the relative degree of intrusion or onus represented by various sanctions. For example, is a \$100 fine more onerous than 100 hours of community service work or 100 days of probation? Nevertheless, the Commission is of the opinion that some indication of the relative weights of community sanctions will assist the courts.

The widespread use of fines is not surprising in view of its many advantages. The fine does not disrupt the offender's social and economic ties with the community. Further, the fine is an expedient and inexpensive sanction to administer as it requires relatively few supervisory personnel. It generates revenue for the state and thereby helps to defray the costs of criminal justice (*Verdun-Jones and Mitchell-Banks, 1986; 10*).

In view of the foregoing,

- 12.16 The Commission recommends that for those offences for which a judge has decided to impose a community disposition, a pecuniary sanction such as a fine be considered as a first alternative for the more serious offences and for the more serious instances of the lesser offences.**

Specific reference to fines in the recommendation is not intended to preclude consideration of other pecuniary sanctions such as restitution. Indeed, the Commission has recommended the expansion and greater use of restitution elsewhere in this chapter.

One refinement on the general recommendation noted above is to offer specific guidance respecting the disposition of a fine, as opposed to a restitution order.

- 12.17 The Commission recommends that a restitution order be imposed when the offence involves loss or damage to an individual victim. A fine should be imposed where a public institution incurs loss as a result of the offence or damage caused to public property.**

The Ouimet Committee recommended that greater use should be made of fines, in suitable cases, where the offender has benefitted financially from the commission of the offence either in lieu of or in addition to a sentence of imprisonment (Ouimet, 1969; 199). This principle is recognized in British jurisprudence and is premised on the position that an offender should not profit from wrongdoing (Thomas, 1983).

12.18 The Commission recommends that where the offence carries a presumptive “out” disposition, greater use be made of fines where the offender has benefitted financially from the commission of the offence.

3.2.2 Assessing the Amount of the Fine

Research undertaken for the Commission states that “judges are given almost unfettered discretion in calculating the amount of the fine to suit the means of the offender, the severity of the offence and the circumstances of the offender” (*Verdun-Jones and Mitchell-Banks, 1986; 35*). Pursuant to the Commission’s cardinal principle of proportionality, the initial decision respecting the amount of a fine should depend upon the gravity of the offence and the degree of responsibility of the offender. However, the Commission’s statement of purpose and principles also indicates that, in determining the sentence to be imposed on an offender, the sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances. In the context of fines, this principle relates to the equity of impact of the fine on the offender; that is, that two offenders who are convicted of exactly the same offence and are ordered to pay identical fines may nevertheless suffer the consequences of the sentence in vastly different ways, depending upon their individual financial circumstances.

Inherent in proposals to equalize the impact of fines is a recognition that some offenders, such as native offenders and female offenders, are seriously handicapped in their ability to pay fines because of their relative poverty. A recent report by the Status of Women, Canada, *A Feminist Review of Criminal Law* (1986) noted:

In view of the economic situation of women and their increasing marginalization in terms of income and employment, specific rules should be established regarding the fines that can be imposed on them. Moreover, the imprisonment of female offenders for failing to pay fines must be seriously examined (p. 132).

There are two provisions of the *Criminal Code* which direct the court to consider the means of the offender to pay the fine. Subsection 646(5)(a) provides that the court shall not direct, at the time a fine is imposed, that it be paid forthwith unless it is satisfied that the offender has sufficient means to pay the fine in this manner. Subsection 646(10) provides that where an offender who has been given time to pay a fine defaults in payment of that fine and he or she appears to be between the ages of 16 and 21, the court must obtain and consider a report respecting the offender’s ability to pay the fine before ordering incarceration for default.

One of the most precise mechanisms for measuring the relative impact of fines on offenders of different economic means is the day-fine system. This is by no means a novel or limited concept as it is currently being used in Finland, Sweden, Cuba, Denmark, Peru, Brazil, Costa Rica, Bolivia, West Germany and Austria (*Verdun-Jones and Mitchell-Banks, 1986; 42*). The basic elements of the Swedish day-fine system will be examined since it is one of the better known systems. The day-fine system in Sweden, which has been in use since 1931, is made up of two components. The first element is the *number* of day-fine units which reflects the gravity of the offence and the culpability of the offender. The number of day-fine units may range from 1 to 120 (or from 1 to 180 for multiple offences). In determining the number of day-fine units to be imposed, the sentencing judge takes into account the same factors which concern Canadian judges: the methods by which the offence was carried out, the damage or harm caused, mitigating and aggravating circumstances and sentencing principles, etc. In theory, all offenders in similar circumstances who commit similar offences should receive a similar number of day-fine units (*Verdun-Jones and Mitchell-Banks, 1986; 43*).

The second component of the day-fine is the *value* of the day-fine unit expressed in terms of a monetary sum. This amount may vary from 2 kronor (approximately \$.38) to 500 kronor (approximately \$95.00). It is the value of the day-fine unit which equalizes the impact of the fine since it is calculated as 1/1000th of the offender's annual income (after deducting employment and essential living expenses) (*Verdun-Jones and Mitchell-Banks, 1986; 44*).

The total value of the day-fine is calculated by multiplying the *number* of day-fine units by the *value* of the day-fine unit. For example, if the number of day-fine units reflecting the gravity of the offence is 5 and the value of the day-fine unit is \$5.00, then the total value of the day-fine would be \$25.00. A wealthier offender who had committed a comparable offence would also receive 5 day-fine units but the value of the day-fine unit would be higher to reflect his or her greater annual income. For example, if this offender was assessed a higher day-fine unit of \$15.00 then his or her total fine would be \$75.00. The highest sum which can be imposed in one sentence for a day-fine is 60,000 kronor (\$11,400) for one offence (120 x 500 kronor) or 90,000 kronor (\$17,100) for more than one offence (180 x 500 kronor).

Sweden has retained the concept of global fining for some offences whereby the prosecutor or the court sets the fine at a particular amount. However, the global fine is only used for petty offences, such as small traffic offences or drunkenness or disorderly behaviour and the fines imposed are relatively small. The total value of the fine may vary from 10 to 500 kronor (Thornstedt, 1975; 307).

In its 1974 working paper on fines, the Law Reform Commission of Canada recommended that all fines over \$25.00 should be judicially expressed in terms of day-fines. Further, the court clerk or court administrator should conduct a means inquiry to determine the dollar value of the fine immediately upon pronouncement of the sentence (Law Reform Commission of Canada,

1974; 34). A similar recommendation was made in its 1977 report, *Guidelines; Dispositions and Sentences in the Criminal Process* (Law Reform Commission of Canada, 1977; 25).

The Commission is of the opinion that the Scandinavian day-fine system should be investigated with a view to its possible implementation in Canada. However, there are some features of the Swedish day-fine system which might prove troublesome in the Canadian context and which therefore warrant further examination. For example, public prosecutors play a major sentencing role in Sweden. Seventy-five percent of the fines imposed are achieved by way of a “consent” agreement between the prosecutor and the defendant. The prosecutor is empowered to propose a fine (up to 50 day-fines or 60 day-fines for multiple offences) which the offender may accept. If accepted, the fine has the same legal effect as a sentence of the court. This system, which has been in operation since 1948, applies to all offences punishable by fines alone as well as to lesser offences which are punishable by either a fine or a short prison term (Thornstedt, 1986; 307 cited in *Verdun-Jones and Mitchell-Banks, 1986; 45,46*). If similar consent agreements were imported into the Canadian context, consideration should be given to standardizing the approach to the agreements in light of provincial jurisdiction over the prosecution of *Criminal Code* offences. Also, given the federal government’s stated commitment to accountability and visibility in the exercise of discretion by various actors in the criminal justice system, mechanisms would seem advisable which enhanced the visibility of the agreements (Canada, *The Criminal Law in Canadian Society*, 1982; 6).

A second feature of the Swedish day-fine system which is very different from the Canadian criminal justice system is that information about the offender’s financial status is readily accessible to the police, the courts and the public (Law Reform Commission of Canada, 1974; 45). Canadian courts currently rely primarily on the offender’s voluntary disclosure of his or her means in assessing the amount of a fine. Any provision for compulsory self-disclosure at a sentencing hearing should be cast with a view to subsection 11(c) of the *Canadian Charter of Rights and Freedoms*³² which protects a person from being compelled as a witness where he or she is the subject of criminal proceedings.

In view of the absence of pilot projects respecting the day-fine system and of studies on the changes to the *Criminal Code* which would be necessary if such a system were introduced into Canada, the Commission does not recommend the introduction of the day-fine system at this time. However, as a long-term goal, a mechanism should be formulated to maximize equity of the impact of fines.

12.19 The Commission recommends that the permanent sentencing commission should consider ways of assisting the courts in the determination of equitable fines on offenders of varying means so as to maximize equality of impact. The Swedish day-fine system is an example to be studied. Meanwhile, the provinces should be encouraged to institute pilot projects on the use of day-fine systems.

As a short-term measure, the Commission recommends the use of a “means inquiry” prior to the imposition of a fine. The Commission proposes that the amount of the fine, the time within which it is to be paid and the terms of payment should all be determined in accordance with the financial ability of the offender.

12.20 The Commission recommends that once it has been decided that a fine may be the appropriate sanction, consideration must be given to whether it is appropriate to impose a fine on the individual before the court. The amount of the fine and time for payment must be determined in accordance not only with the gravity of the offence, but also with the financial ability of the offender. Further to the above principle, prior to the imposition of a fine, the court should inquire into the means of the offender to determine his ability to pay and the appropriate mode and conditions of payment.

The use of means inquiries to ensure equity of impact of fines on offenders of different economic means was recommended by both the Ouimet Committee and the Law Reform Commission of Canada.³³ The Criminal Law Reform Act, 1984 (Bill C-19) not only endorsed the use of a means inquiry to determine the amount of fines but also made several proposals for bringing this information to the attention of the court. The Commission endorses the following recommendations made in that proposed legislation stating:

- a) In appropriate cases, the pre-sentence report should contain information respecting the financial status of the offender and, in particular, his ability to make restitution or to pay the fine.
- b) Before making an order to pay an amount by way of restitution or a fine and for the purpose of determining the amount to be paid, the time for payment, the court shall, unless the offender acknowledges his ability to pay, inquire or cause to be conducted an inquiry into the present or future ability of the offender to pay the amount and, in so doing, the court shall consider:
 - (i) the employment, earning ability and financial resources of the offender in the present or future and any other circumstances that may affect the ability of the offender to make restitution or to pay the fine; and
 - (ii) any benefit, financial or otherwise, received by the offender as a result of the commission of the offence
 - (iii) the court may require the offender to disclose to the court, orally or in writing, particulars of his financial circumstances in the manner and form prescribed by the court and such information shall not be used for any other purpose.

The second recommendation noted above clarifies that an assessment of the offender’s ability to pay would include more than just his or her current income. The comments made earlier respecting possible *Charter* problems with compulsory financial disclosure by the offender apply with equal force to the third subsection of the second recommendation. However, the Commission

recognizes that compulsory self-disclosure in the context of a sentencing hearing is not as weighty a concern as self-incrimination in proceedings which precede a determination of guilt.

As noted earlier, the Commission has recommended the imposition of a pecuniary penalty such as a fine, for the more serious offences for which a community disposition is appropriate. The Commission proposes a recommendation which further refines this position and is consistent with the proposal of the Ouimet Committee that the amount of a fine should not negate the offender's ability to make restitution to the victim (Ouimet, 1969; 198). The Commission endorses the provision in the Criminal Law Reform Act, 1984 (Bill C-19) which directed the court to give priority to the imposition of restitution orders, in appropriate cases, where the offender has limited means.

12.21 The Commission recommends that where the limited means of an offender permits the imposition of only one pecuniary order, priority be given to an order of restitution, where appropriate.

This recommendation recognizes the coercive nature of both fines and restitution orders. It also embodies the policy that, as between compensation to the state or to individual victims, priority should be given to the latter.

3.3 Fine Default

The current substantive provisions and judicial practice respecting default militate against equity in the impact of fines. Both subsections 646(3) (relating to indictable offences) and subsections 722(1) and (2) (relating to summary conviction offences) permit, but do not direct, the sentencing court to impose a period of incarceration in default of payment of the fine. The practice has arisen whereby the court routinely specifies a period of incarceration to be served in default of payment of the fine at the time that the fine is imposed. If the offender fails to satisfy the fine prior to the expiration of the payment period, a warrant is issued by the court for the offender's arrest and committal to prison.³⁴ The provisions of section 646 of the *Criminal Code* (which by recent amendment apply to both indictable and summary conviction offences)³⁵ permit an application to be made by or on behalf of the offender for an extension of time to pay the fine. However, there is no general test that the offender's default relates to a refusal as opposed to an inability to pay the fine. The only provision which at all resembles a test of this nature is subsection 646(10) which directs the court to obtain and consider a report concerning the offender's ability to pay the fine prior to issuing a warrant for default where the offender appears to be between the ages of 16 and 21.

The imposition of a "semi-automatic" prison term for fine default has been the subject of relentless criticism in the sentencing literature. There is statistical evidence to support the conclusion that the imprisonment of fine defaulters without reference to their ability to pay discriminates against impoverished offenders. One highly visible example of this phenomenon is the over-representation of native persons in provincial institutions (Joint Study: Government of Canada, Government of Saskatchewan & Federation of

Saskatchewan Indian Nations, 1985; 41). The breach of a sanction imposed initially because it is more appropriate than imprisonment, does not *per se* justify the imposition of a custodial sentence. As noted by the Ouimet Committee “the fact that a fine – however substantial – has been imposed rather than a sentence of imprisonment cannot be considered as anything but an implicit acknowledgement that the offender presents no problem of dangerousness” (Ouimet, 1969; 198). In the context of the Commission’s proposed regime of presumptive dispositions where community dispositions have been assigned for many offences, it can only be seen as offending the principle of proportionality to impose prison terms routinely for breach of such sanctions.

A second compelling reason for modification of current provisions respecting fine default is the degree to which fine defaulters comprise present provincial prison populations. For example, in 1983, fine defaulters made up 14% of prison populations in British Columbia and 32% and 48% in Ontario and Quebec, respectively (*Verdun-Jones and Mitchell-Banks, 1986; 72*). Another study gives a more detailed breakdown of incarceration rates for fine default in Quebec. Between 1977 and 1984, 48% of all admissions to Quebec provincial institutions were for fine default. Approximately 60% of these admissions were for default in the payment of fines imposed for traffic offences. In recent years, this percentage has risen to 69% of the total admissions for fine default (1982 – 1983) (Québec, Ministère du Solliciteur général, 1986). A further study notes that the elimination of incarceration for non-payment of civil debts has not resulted in social disorder (Rapport d’enquête du Protecteur du Citoyen, 1985; 12 cited in *Pires, 1986; 125*).

In view of the foregoing comments,

12.22 The Commission recommends a reduction in the use of imprisonment for fine default.

Jurisprudence has emerged recently which challenges the traditional practice of imposing a term of imprisonment for fine default at the same time that the fine is imposed. In *R. v. Deeb; R. v. Wilson*,³⁶ the court indicated that imprisonment for non-payment of a fine is simply an enforcement mechanism and should not be considered by the court unless there are unusual and exceptional circumstances to warrant imprisonment.

The Law Reform Commission of Canada, and the Ouimet and Fauteux Committees³⁷ have all recommended that incarceration for non-payment of fines should be based on refusal or wilful default as opposed to inability to pay. In view of the foregoing considerations,

12.23 The Commission recommends that a quasi-automatic prison term not be imposed for fine default and that offenders only be incarcerated for wilful breach of a community sanction.

In formulating an alternative model for fine default, the Commission has attempted to strike a balance between effective enforcement and the sentencing goals of equity, fairness and proportionality. The thrust of the Commission’s

recommendations respecting models for fine default is twofold: to maintain avenues of civil redress for the enforcement of fines against corporations; and to develop an enforcement mechanism for fine default by individuals which is premised on the policy that imprisonment should be used as a last resort for wilful default.

3.3.1 Civil Redress

Section 652 of the *Criminal Code* empowers the Crown to institute civil proceedings to recover or enforce a fine, pecuniary penalty or forfeiture imposed by law where no other mode of recovery is prescribed. Section 648 is a very specific provision respecting the enforcement of a fine imposed on a corporation:

648. Where a fine that is imposed on a corporation is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the corporation in the same manner as if it were a judgment rendered against the corporation in that court in civil proceedings. 1968-69, c. 38, s. 69.

The use of civil procedures for the enforcement of fines is consistent with the Commission's sentencing policy.

12.24 The Commission recommends that section 648 of the *Criminal Code* be retained.

3.3.2 A Model for Fine Default

Having recommended a reduction in the use of incarceration for fine default, the Commission then considered six default models to effect this goal. In assessing the relative merits of these various models the Commission was guided by the following criteria: that the model should provide a relatively uncomplicated, efficient scheme for fine default and should be premised on the policy that imprisonment should be available only for wilful default. Also, the Commission was anxious that the model minimize costs by utilizing existing personnel and resources within the criminal justice system. In addition, it was decided that a judge of the original sentencing court should be empowered either to vary the original terms of the fine or impose sanctions for non-payment of the fine. This approach prompted the Commission to reject two variations on an administrative scheme of enforcement which were patterned after default schemes in Sweden and West Germany. The basic feature of an administrative model is to establish primary responsibility for collection, enforcement and/or variation of the fine in an administrative authority. The court would only be involved in imposing a term of imprisonment on a defaulter who persistently avoided payment.

Another model considered by the Commission was one that would have created a separate offence of wilful default. If the offender had failed to pay

the fine at the expiration of the payment period, an information could be laid based on reasonable and probable grounds that a wilful breach of a court order had occurred. A successful prosecution for this offence would result in a conviction of wilful refusal. In rejecting this proposal the Commission was concerned about the evidentiary problems associated with Crown counsel proving “wilful default” and with the anticipated increase in case volume generated by the creation of a new offence.

Another enforcement mechanism considered by the Commission paralleled the enforcement scheme set out in the Criminal Law Reform Act, 1984 (Bill C-19). Though not creating a separate offence for wilful refusal to pay the fine, this regime would utilize the laying of an information as the mechanism for compelling the offender’s attendance before the court at a show cause hearing. At this hearing the onus would be on the offender to prove, on a balance of probabilities, his or her reasonable excuse for non-payment of the fine. If the court was satisfied that the offender had a reasonable excuse for non-payment, it could vary the terms of the order to pay the fine (except the amount of the fine imposed). However, if the offender failed to establish a reasonable excuse for non-payment, the court could resort to civil remedies to collect the fine or, alternatively, could impose a term of imprisonment as a last resort. The Commission rejected the use of an information to compel the offender’s attendance at a show cause hearing. However, there were many features of this model which the Commission supported and which it incorporated into its preferred model of fine default.

Before discussing the elements of the Commission’s preferred model for fine default, it is important to highlight the context within which it would operate. As mentioned earlier, the initial decision to impose a fine and the amount of the fine would be based both on the gravity of the offence and on the offender’s financial resources. The latter would be obtained from information or representations submitted to the court during the means inquiry at the sentencing hearing. These provisions are intended to minimize the numbers of offenders who default in the payment of their fines because of an inability to pay.

The Commission’s recommended model for fine default will be presented by describing the features of the scheme rather than by enumerating a series of independent recommendations. The elements of that model are as follows:

Under the Commission’s recommended default scheme, an offender who anticipated difficulty in meeting the terms of the fine could make an *ex parte* application to the court for a further extension of time prior to the expiration of the payment period. An offender who had failed to pay the fine in conformity either with the original order of the court or with an extension order, would be under a positive obligation to return to the court on or before the end of the payment period to explain his or her non-payment. A defaulting offender who failed to follow this procedure could be arrested and brought to court to explain why payment of the fine had not been made.

The procedure at the show cause hearing would be the same whether or not the offender initiated the proceedings or was brought by warrant before the court: the court would be required to hear the representations of both the prosecutor and the offender. The latter would bear the onus of proving, on a balance of probabilities, a reasonable excuse for non-payment of the fine. If a reasonable excuse was established, the court would have the discretion to extend the period for payment and/or vary any other term of the order, except the amount to be paid. Variation of the amount of the fine is prohibited to prevent the show cause hearing from constituting an unofficial “appeal” of the original fine. However, the court could impose an alternative sanction where a change in the offender’s circumstances so adversely affected his or her ability to pay that future payment of the fine would be unlikely.

Where the offender did not establish a reasonable excuse for non-payment of the fine, the court could do one of two things. The court could adjourn the hearing for a period not exceeding 30 days where the offender indicated his or her ability and intention to make full payment of the fine within that time. Alternatively, the court could decide to proceed immediately with enforcement of the fine by making one of the following orders:

- i) attachment of the salary, wages or other monies owned by or payable to the offender;
- ii) order seizure of property of the offender in accordance with the law;
- iii) direct the order to be filed and entered as a judgment for the unpaid amount of the order in the superior court of the province in which the trial was held;
- iv) order that the offender be enrolled in a fine-option program (where available);
- v) order that the offender effect payment by enrollment at a community service program (where available) (credited at the minimum hourly wage in effect in the province);
- vi) as a last resort, or where the court is of the opinion that any of the methods provided for in paragraphs (i) to (v) would not likely result in payment (or its equivalent) impose a term of imprisonment.

The orders (i) to (v) could be made separately or in suitable combination with one another. In the event that an offender wilfully failed to comply with a variation order or failed to comply with the non-custodial enforcement mechanisms noted above (or where they failed to produce full payment of the fine) the court could impose a term of imprisonment for default of payment.

12.25 The Commission recommends that the payment of fines be enforced in accordance with the model for fine default described above.

The above model is recommended with the understanding that the technical and legal details of a default scheme may need further development and refinement. In the further development of the civil enforcement

procedures, the Commission wishes to stress the fact that in order to result in effective enforcement, such procedures must be simplified and capable of more efficient execution than currently is possible in civil proceedings. Accordingly, the Commission urges federal and provincial governments to streamline civil procedures used for enforcement of fines and restitution orders.

The Commission also encourages the provincial governments to continue to develop innovative methods for the collection of provincial fines. For example, one province has tied default in the payment of provincial fines to the suspension of provincial privileges, e.g., a driver's licence.³⁸

3.3.3 Equity of Impact

Research undertaken for the Commission shows wide disparity in the lengths of prison sentences served by offenders for default of fines of equal amounts. Some offenders are serving their fines at the rate of \$3.00 per day while others are serving them at the rate of \$70.00 per day (*Verdun-Jones and Mitchell-Banks, 1986; 9*). This research recommends that the length of the sentence should be commensurate with the size of the fine imposed and that a formula should be devised to reduce sentencing disparity in the *per diem* rates at which offenders are serving their sentences (*Verdun-Jones and Mitchell-Banks, 1986; 9*).

An examination of a number of cases wherein default periods were indicated for fines of varying amounts was undertaken by Commission research staff. This review indicated two types of disparity: disparity in default periods given for fines of equal amounts; and disproportionate default periods imposed for fines of different amounts. An example of the first type of disparity is the imposition of a default period of 14 days in one case, and 60 days in another case, for failure to pay fines of equal amounts. An example of the second type of disparity is as follows: a 30 day default period is given for a fine of between \$150 and \$300 whereas a 14 day default period is given for a fine in the \$300 to \$500 range.

In the Commission's view, it would be inconsistent to recommend a significant reduction in the use of incarceration for fine default while also ignoring huge disparities in the rates at which fines are discharged when imprisonment is imposed. In an effort to equalize the impact of default upon offenders who are incarcerated for non-payment of fines, the Commission considered a number of models to convert fines into default periods of incarceration. The national conversion table is proposed as an interim measure only, in view of the Commission's earlier-noted recommendation that the permanent sentencing commission should consider ways of assisting the courts in determining equitable fines for offenders of different means who have committed comparable offences.

Some preliminary remarks should precede a discussion of the Commission's proposed conversion table. Just as the means inquiry recommended by the Commission would provide, at best, only relative equity in the impact of fines, a national conversion table can also only provide relative equity

of impact regarding fine default. Absolute equity of the impact of fine default is only achieved in a system like the Swedish day-fine system where one day of imprisonment is imposed for every day-fine unit in default. Since the day-fine units are determined by the gravity of the offence, all offenders who have committed offences of comparable gravity are given the same period of incarceration even though the amount of the fine varies in accordance with the offender's means.

In the absence of a mechanism like the day-fine unit described above, the total amount of the fine reflects both the gravity of the offence and the offender's means. Thus, in the Canadian context, the amount of fines may vary either because they are given for offences of different degrees of gravity or because they are given for offenders of different means who have committed comparable offences. A national conversion table must be flexible enough to accommodate both of these situations. In this context, absolute equity of fine default would mean that offenders who had committed similar offences would receive similar default periods despite variations in the amount of the fine which reflected their different resources. The Commission rejected this approach on the basis that it would discourage the payment of higher fines. In formulating a mechanism to equalize the impact of fine default, the Commission tried to balance equity considerations with those of effective enforcement.

The Commission studied four models for a national conversion table respecting fine default. A model outlining a flat *per diem* rate for the discharge of fines, for example at \$25 per day, was rejected because there did not appear to be any *per diem* rate which would provide a sufficient default period for lower fines which did not also impose inordinately long default periods on offenders who had received larger fines. The Commission also considered a default table which is currently used in Britain.³⁹ This table establishes a maximum number of days of imprisonment which may be imposed for a fine of a particular amount. This model, though providing considerable judicial discretion respecting fine default periods, was rejected on the basis of its insufficient ability to provide uniformity of approach. A third model considered by the Commission was patterned after subsection 70(5) of the Ontario *Provincial Offences Act*.⁴⁰ This provision provides a range of time which may be imposed for fine default: a minimum of 3 days with a maximum of the greater of 90 days or half of the statutory maximum. The *per diem* rate at which the fine is discharged is \$25.00 per day. The Commission rejected this model for two reasons: its use of a minimum penalty and its complexity. A graduated table which progressively increased the value of the *per diem* rate in accordance with the size of the fine was the fourth model examined by the Commission. It was accepted as the best compromise between uniformity of approach and effective enforcement.

12.26 The Commission recommends that the following national conversion table be used for the assessment of default periods where incarceration is imposed for wilful non-payment of a fine:

| <i>For the portion of the sum between:</i> | <i>Per diem rate:</i> | <i>Prison days:</i> |
|--|-----------------------|-----------------------------------|
| \$1 – \$150 | 25 | 6 |
| \$151 – \$300 | 30 | 6 + 5 = 11 |
| \$301 – \$500 | 35 | 11 + 6 = 17 |
| \$501 – \$800 | 40 | 17 + 8 = 25 |
| \$801 – \$1200 | 45 | 25 + 9 = 34 |
| \$1201 – \$2000 | 50 | 34 + 16 = 50 |
| \$2001 – \$4000 | 60 | 50 + 33 = 83 |
| \$4001 – \$7000 | 70 | 83 + 43 = 126 |
| \$7001 – \$10,000 | 80 | 126 + 38 = 164 |
| \$10,001 – \$15,000 | 90 | 164 + 56 = 220 |
| \$15,001 – \$20,000 | 100 | 220 + 50 = 270 |
| \$20,001 – \$25,000 | 110 | 270 + 45 = 315 |
| \$25,001 + | Judge's discretion | 315 + discretion of the judge. |

The basic approach of the table is to calculate different portions of the fine at different rates. The use of the table however is very simple. To illustrate; a fine of \$1,500 would be calculated as follows: the reader would go to the monetary range on the table which encompassed a fine of \$1,500. They would find that the relevant range was \$1,201 to \$2,000. They would see under the column entitled "prison days" that the first \$1,200 dollars would result in a default period of 34 days. To calculate the additional prison days resulting from a fine of \$1,500 they would subtract \$1,200 from \$1,500 (\$300) and divide that sum by the *per diem rate* of \$50. This results in an additional 6 days and thus the total period of default for a fine of \$1,500 would be 34 plus 6 which is 40 days. A table of this nature would ensure not only that comparable default periods are imposed for fines of comparable amounts but would also permit proportionate default periods to be imposed for fines of different amounts. In recommending the above-noted table to assess periods of incarceration for fine default, the Commission anticipates that a comprehensive table would be drawn up which would obviate the need for sentencing judges to make default calculations on a case by case basis.

4. Restitution

The Commission's discussion of restitution focuses on two issues: the formulation of this disposition as a discrete sanction; and its use as a mechanism to address the loss or damage suffered by victims of crime.

As indicated in Chapter 5, the Commission has resisted casting the concept of sanctions exclusively in terms of "punishment". In fact, the Commission's terms of reference direct it to develop its policies in conformity with the federal government's criminal law policy set out in *The Criminal Law in Canadian Society*. Principle (g)(ii) of that document directs the criminal justice system to promote and provide for redress or recompense for the harm

done to the victim of the offence. The Commission's commitment to this principle is reflected in its description of community sanctions as either compensatory or non-compensatory.

4.1 A Definition of Restitution

The *Criminal Code* generates confusion about the exact meaning of "restitution" by using the terms restitution and compensation interchangeably. Pursuant to section 653 of the *Code*, the term compensation denotes the payment of money by the offender to a "person aggrieved" (usually the victim) for loss of or damage to property as a result of the commission of an indictable offence. However, in subsection 663(2)(e) of the *Code*, the court may order the offender to make restitution or reparation as part of a probation order to any person aggrieved or injured for loss or damage suffered as a result of the offence. In the Commission's view, the *Criminal Code* should be amended to clearly distinguish the concept of restitution from that of compensation. Further, the Commission adopts definitions of these measures which are similar to those recommended by the Law Reform Commission of Canada (1974: 8).

- 12.27 The Commission recommends that the *Criminal Code* clarify the distinction between compensation and restitution by providing a definition of restitution which is used consistently throughout the *Code*.**
- 12.28 The Commission recommends that restitution in the *Criminal Code* be understood to include the return of property obtained by the commission of the offence, the payment of money for the ascertainable loss, damage or destruction of property and/or the payment of money for the ascertainable loss or injury suffered as a result of the commission of the offence, by the offender to the victim.**
- 12.29 The Commission recommends that compensation be understood as contribution or payment by the state to the victim of the offence for loss or injury suffered as a result of the commission of the offence.**

In the context of these definitions, restitution and compensation therefore represent two different, but complementary, strategies for repairing and restoring the losses to victims of crime. As noted by the Canadian Federal Provincial Task Force on Justice for Victims of Crime 1983:

Restitution is the strategy of adapting the sentencing process to require the offender to recognize the losses of the victim, and to attempt to restore these losses. Compensation is a strategy based on the recognition of the limits of restitution as a solution to the costs of crime. It generally involves the establishing of government-based Criminal Injuries Compensation Boards to which a victim can apply for restoration of certain forms of loss (p. 32).

The provincial compensation schemes noted in the above quote are not *per se* within the Commission's mandate. However, the Commission's examination

of these programs has led it to conclude that victims of crime can only be adequately compensated if these provincial schemes are supplemented by an expanded sanction of restitution. These compensation schemes exist in all provinces and territories in Canada, with the exception of Prince Edward Island. They are designed to aid the victims of violent crime. Compensation is extended not only to victims themselves but to surviving dependants of victims of homicide and to citizens who are injured in the course of attempting to enforce or assist in the enforcement of the law (Canadian Federal-Provincial Task Force on Justice for Victims of Crime, 1983; 33). Compensation may be obtained for losses incurred as a result of the injury, death or disability of the victim. The Crime compensation programs are funded on a cost-sharing basis between the federal and provincial governments (Federal-Provincial Task Force on Justice for Victims of Crime, 1983; 33).

The findings of the Task Force on Victims of Crime are in accord with the Commission's conclusion that the compensation schemes must be supplemented by a more comprehensive restitution sanction. The Task Force notes that in 1981-82, there were 3,041 completed decisions made respecting compensation with an average award of \$2,859.96. Unfortunately, the number of victims compensated represents an extremely small proportion of all the victims of crime for the same period (Federal-Provincial Task Force on Justice for Victims of Crime, 1983; 34).

4.2 Greater Use of Restitution

The Commission's recommendations respecting restitution are premised on the policy that the authority to impose this sanction should be expanded and clarified, in order to meet the needs of the victims of crime.

The concept of restitution is not new. In Anglo-Saxon England disputes were dealt with by a process which greatly resembles our civil law. An individual who had suffered loss or injury because of another's wrongful conduct could either settle the matter by agreement or could proceed before a tribunal. Restitution was extremely common and other sanctions, such as imprisonment, were rarely used (Law Reform Commission of Canada, 1974; 8).

As the common law developed, criminal law became a distinct branch of the law. A number of anti-social acts were seen to be offences against the state rather than personal wrongs. This tendency to characterize some wrongs as crimes was encouraged by the practice under which the lands and property of convicted persons were forfeited to the king or feudal lord. In time, fines and property that would have gone to satisfy the victim's claims were diverted to the state (Law Reform Commission of Canada, 1974; 9). Thus, the emergence of the state's interest in controlling crime and in punishing the offender resulted in a corresponding decrease in the importance of the victim's interest in retribution and reparation for harm done.

In its working paper on the *Principles of Sentencing and Dispositions*, the Law Reform Commission of Canada has indicated that the principal function of sentencing should be to choose a just sanction (1974; 3). In its working paper on *Restitution and Compensation*, the Law Reform Commission expands upon this concept and indicates that if justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed. Restitution is an ideal measure to achieve this redress. Restitution personalizes the offence by inviting the offender to see his or her conduct in terms of the damage and injury done to the victim. Finally, restitution contemplates that the offender has the capacity to accept responsibility for the offence and that he or she will in many cases be willing to discharge that responsibility by making amends (Law Reform Commission of Canada, 1974a; 7).

Those briefs submitted to the Commission which addressed the question of victims and reparative sanctions provided consensus on two issues: that the criminal justice system generally should be more responsive to the needs of victims; and, secondly, that greater use should be made of restitution to compensate victims of crime for injury or loss they have suffered. In addition, a number of groups supported the use of restitution as a separate sanction.

The concept of recognizing restitution as a separate sanction was advocated by the Law Reform Commission of Canada in its 1977 report *Guidelines; Dispositions and Sentences in the Criminal Process* (p. 64). That report outlined a number of other recommendations to complement this proposal:

- The Code should require the court to give consideration to this sentence so that priority is given to the interests of the victim.
- The Code should authorize the court to order a wide variety of forms of restitution appropriate to the circumstances of the offence, the offender and the victim. Restitution schemes involving the co-operation of the victim, should be subject to the victim's consent.
- The court, with the assistance of officials appointed by it, should be given the power to supervise and enforce compliance with the order. The victim should not be required to resort to the civil courts to enforce the order.
- Federal and provincial legislation and cost sharing agreements are required to empower the court, in the circumstances specified in the Report, to order the state to pay compensation.

The Federal-Provincial Task Force on Justice for Victims of Crime made a number of recommendations respecting the prompt return of property used in criminal proceedings to victims of crime (1983; 156). It also formulated the following recommendations relating specifically to restitution:

The *Criminal Code* s. 653 be amended to require judges to consider restitution in all appropriate cases and to provide an opportunity to victims to make representations to the court regarding their ascertainable losses.

A provision should be included in the *Criminal Code* to empower the court to impose a jail term where the accused wilfully defaults in the restitution ordered by the court.

The Commission has already addressed the first recommendation of the Task Force respecting the imposition of restitution. The Commission endorses the second recommendation noted above.

12.30 The Commission recommends that its fine default model also apply to the enforcement of restitution orders.

Research undertaken for the Commission on the role of the victim in the sentencing process also recommended much more extensive use of reparation from the offender in the criminal justice process (*Waller, 1986; 16*). This research suggested four means by which this objective could be achieved:

1. By an independent sanction of restitution in the *Criminal Code* (as defined by the Commission).
2. By a positive obligation on judges to order restitution unless reasons are given respecting why such an order cannot be made (e.g., the offender does not have the resources to pay restitution).
3. By an obligation on the prosecutor to introduce a written report at the sentencing hearing respecting the extent of damage experienced by the victim.
4. By giving the victim the right to present additional information to the court.

Many of the foregoing proposals were incorporated into the restitution provisions of the Criminal Law Reform Act, 1984 (Bill C-19). Restitution was formulated as a sanction in its own right which could be imposed either independently or in conjunction with other sanctions. Bill C-19 eliminated reference to “compensation” and cast the term “restitution” to include the return of property, recompense for loss, damage or destruction of property as well as monetary payments for injury suffered as a result of the commission of the offence. The Bill also provided for the imposition of punitive damages which were subject to statutory ceilings.

The first of two additional changes suggested by the restitution scheme in Bill C-19 was to extend the concept of the “victim” to include a person who was injured or whose property was damaged while assisting in the arrest of the offender or while preventing the commission of the offence. A second change was to permit the court to order restitution in accordance with a “restitution agreement” made between the offender and the victim. The terms of the agreement could include restoration or payment in lieu of property obtained through the commission of the offence or the performance of unpaid work as restitution for any loss or damage to property or injury suffered by the victim. However, the agreement could not address the issue of punitive damages.

The terms of the restitution order were to be made at the discretion of the court although the order was not to exceed three years.

The Commission endorses the direction in Bill C-19 towards the expansion and clarification of the use of restitution as a reparative sanction. The Commission is of the view that the federal government should revisit these proposals and should address the specific measures proposed. The Commission makes the following recommendations which discuss the issues of restitution as a separate sanction, the priority of restitution orders and the factors which should be considered in making a restitution order.

12.31 The Commission recommends that the *Criminal Code* provisions be expanded and permit an order of restitution to be imposed as a separate sanction or in combination with other sanctions.

Prior to the imposition of an order of restitution, the sentencing judge shall inquire, or cause to be conducted, an inquiry into the present or future ability of the offender to make restitution or to pay a fine.

An order of restitution shall include consideration of:

- i) property damages incurred as a result of the crime, based on actual cost of repair (or replacement value);**
- ii) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime; and**
- iii) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime.**

As between the enforcement of an order of restitution and other monetary sanctions, priority should be given to restitution.

The main thrust of the Commission's recommendations respecting restitution has been to recommend the redefinition and expansion of restitution as an independent sanction and to encourage its greater use. This approach recognizes the two main strengths of restitution as a sanction: first, it treats the offender as a rational person and provides opportunities for the offender to accept responsibility for the offence and to discharge that responsibility by making amends. It also accords with a basic sense of fairness by depriving offenders of the fruits of their crimes. Second, as a reparative sanction, restitution permits the sentencing process to be more responsive to the needs of victims and to compensate them for their loss or injury. The Law Reform Commission of Canada notes that restitution is a means by which the victim's claim to satisfaction is recognized and further, that an important part of this recognition is the victim's psychological need that notice be taken of the wrong done (Law Reform Commission of Canada, 1974; 7).

The Commission has taken the position that the specific procedural and evidentiary provisions which will be needed to effect its policy on restitution, if adopted, are beyond the terms of its mandate. However, the Commission

emphasizes that if restitution is to be fully utilized, procedures must be developed to bring information respecting loss or damage before the sentencing court for the assessment of restitution orders. Further, modification of current enforcement mechanisms will be needed to enhance their effectiveness. In this regard, the Government might wish to revisit the proposals respecting restitution enumerated in the Criminal Law Reform Act, 1984 (Bill C-19). The Commission is of the view that additional proposals should be examined such as the use of fines to provide funds to provincial compensation schemes.

5. Conclusion

It has been said that community sanctions are the poor cousin of incarceration. The Commission's policy respecting community sanctions should dispel this notion as it is premised on the view that community dispositions should have a prominent and important role in a just sentencing scheme.

The Commission's approach to these sanctions is one of encouraging their use in a principled way. This policy has a number of components, chief of which are the following: a clear definition of the nature of community sanctions; presumptive indications of their appropriate use; and guidance respecting their imposition both generally and in relation to each other.

The Commission has attempted to give an illustration of its concept of "guidance" by formulating recommendations respecting the use of two specific sanctions: fines and restitution. In doing so, the Commission has recognized that community sanctions have a greater potential to meet the needs of native offenders and persons who live in remote communities. In recommending greater use of community sanctions, the Commission calls upon governments to make a serious commitment to provide the resources necessary for the development of programs in all communities across Canada. In the Commission's view, all of these steps will ensure the further evolution of community dispositions as viable sentencing options.

6. List of Recommendations

- 12.1 The Commission recommends that the federal and provincial governments provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use.**
- 12.2 The Commission recommends the development of mechanisms to provide better information about sentencing objectives to sentence administrators.**
- 12.3 The Commission recommends that a transcript of the sentencing judgment be made available to the authorities involved in the administration of the sentence.**

- 12.4 The Commission recommends that court officials, corrections personnel and other sentence administrators meet and discuss the parameters of authority in criminal justice administration, sentencing objectives and other issues in sentencing.
- 12.5 The Commission recommends the development of mechanisms to provide better information about alternative sentencing resources to the judiciary.
- 12.6 The Commission recommends that feedback to the courts regarding the effectiveness of sanctions be provided on a systematic basis.
- 12.7 The Commission recommends that prior to imposing a particular community sanction, the sentencing judge be advised to consult or obtain a report respecting the suitability of the offender for the sanction and the availability of programs to support such a disposition.
- 12.8 The Commission endorses the general policy in the Criminal Law Reform Act, 1984 (former Bill C-19) that community sanctions be developed as independent sanctions. The Commission recommends that the federal government enact legislation which reflects the sentencing proposals in the Criminal Law Reform Act, 1984 (Bill C-19). The Commission further recommends that additional proposals be examined by the Permanent Sentencing Commission and by the federal and/or provincial governments for further review, development and implementation.
- 12.9 The Commission recommends that community sanctions be defined and applied as sanctions in their own right.
- 12.10 The Commission recommends that specific guidance be developed, either by the permanent sentencing commission or by a body specifically mandated to study this issue, respecting when particular community sanctions should be imposed.
- 12.11 The Commission recommends that the Permanent Sentencing Commission consider the feasibility of developing criteria and principles which permit the comparison of individual community sanctions and which attempt to standardize their use (e.g., X dollars equate Y hours of community service).
- 12.12 The Commission recommends that the judiciary retain primary control over the nature and conditions attached to community sanctions.
- 12.13 The Commission recommends that the Permanent Sentencing Commission include in its review of community sanctions both those dispositions imposed by the judge at the time of sentencing and administrative programs in the custodial setting which affect the degrees of incarceration to which an inmate is subject.

- 12.14 The Commission recommends that the *Criminal Code* be amended to permit the imposition of a fine alone even for those offences which are punishable by a term of imprisonment of more than five years.
- 12.15 The Commission recommends that fines be available for all offences (except life sentences) regardless of the maximum penalty provided and in spite of the fact that some offences would have presumptive “in” designations. Where the imposition of a fine would constitute a departure from the presumptive disposition, it should be justified with reasons.
- 12.16 The Commission recommends that for those offences for which a judge has decided to impose a community disposition, a pecuniary sanction such as a fine be considered as a first alternative for the more serious offences and for the more serious instances of the lesser offences.
- 12.17 The Commission recommends that, subject to the previously noted principle, a restitution order be imposed when the offence involves loss or damage to an individual victim. A fine should be imposed where a public institution incurs loss as a result of the offence or damage caused to public property.
- 12.18 The Commission recommends that where the offence carries a presumptive “out” disposition, greater use be made of fines where the offender has benefitted financially from the commission of the offence.
- 12.19 The Commission recommends that the permanent sentencing commission should consider ways of assisting the courts in the determination of equitable fines on offenders of varying means so as to maximize equality of impact. The Swedish day-fine system is an example to be studied. Meanwhile, the provinces should be encouraged to institute pilot projects on the use of day-fine systems.
- 12.20 The Commission recommends that once it has been decided that a fine may be the appropriate sanction, consideration must be given to whether it is appropriate to impose a fine on the individual before the court. The amount of the fine and time for payment must be determined in accordance not only with the gravity of the offence, but also with the financial ability of the offender. Further to the above principle, prior to the imposition of a fine, the court should inquire into the means of the offender to determine his ability to pay and the appropriate mode and conditions of payment.
- 12.21 The Commission recommends that where the limited means of an offender permits the imposition of only one pecuniary order, priority be given to an order of restitution, where appropriate.
- 12.22 The Commission recommends a reduction in the use of imprisonment for fine default.

- 12.23 The Commission recommends that a quasi-automatic prison term not be imposed for fine default and that offenders only be incarcerated for wilful breach of a community sanction.
- 12.24 The Commission recommends that section 648 of the *Criminal Code* be retained.
- 12.25 The Commission recommends that the payment of fines be enforced in accordance with the model for fine default described on pages 382-384.
- 12.26 The Commission recommends that the following national conversion table be used for the assessment of default periods where incarceration is imposed for wilful non-payment of a fine:

| <i>For the portion of the sum between:</i> | <i>Per diem rate:</i> | <i>Prison days:</i> |
|--|-----------------------|-----------------------------------|
| \$1 – \$150 | 25 | 6 |
| \$151 – \$300 | 30 | 6 + 5 = 11 |
| \$301 – \$500 | 35 | 11 + 6 = 17 |
| \$501 – \$800 | 40 | 17 + 8 = 25 |
| \$801 – \$1200 | 45 | 25 + 9 = 34 |
| \$1201 – \$2000 | 50 | 34 + 16 = 50 |
| \$2001 – \$4000 | 60 | 50 + 33 = 83 |
| \$4001 – \$7000 | 70 | 83 + 43 = 126 |
| \$7001 – \$10,000 | 80 | 126 + 38 = 164 |
| \$10,001 – \$15,000 | 90 | 164 + 56 = 220 |
| \$15,001 – \$20,000 | 100 | 220 + 50 = 270 |
| \$20,001 – \$25,000 | 110 | 270 + 45 = 315 |
| \$25,001 + | Judge's discretion | 315 + discretion of the judge. |

- 12.27 The Commission recommends that the *Criminal Code* clarify the distinction between compensation and restitution by providing a definition of restitution which is used consistently throughout the *Code*.
- 12.28 The Commission recommends that restitution in the *Criminal Code* be understood to include the return of property obtained by the commission of the offence, the payment of money for the ascertainable loss, damage or destruction of property and/or the payment of money for the ascertainable loss or injury suffered as a result of the commission of the offence, by the offender to the victim.
- 12.29 The Commission recommends that compensation be understood as contribution or payment by the state to the victim of the offence for loss or injury suffered as a result of the commission of the offence.
- 12.30 The Commission recommends that its fine default model also apply to the enforcement of restitution orders.

12.31 The Commission recommends that the *Criminal Code* provisions be expanded and permit an order of restitution to be imposed as a separate sanction or in combination with other sanctions.

Prior to the imposition of an order of restitution, the sentencing judge shall inquire, or cause to be conducted, an inquiry into the present or future ability of the offender to make restitution or to pay a fine.

An order of restitution shall include consideration of:

- i) property damages incurred as a result of the crime, based on actual cost of repair (or replacement value);
- ii) medical and hospital costs incurred by the victim as a result of the crime; and
- iii) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime.

As between the enforcement of an order of restitution and other monetary sanctions, priority should be given to restitution.

Endnotes

- ^{1.} Two reports on community sanctions undertaken for the Commission have been used extensively throughout this chapter. They were both prepared under the direction of Professor John Ekstedt and will be referred to as *Ekstedt, 1986* and *Ekstedt 1986a*, respectively: Canadian Sentencing Commission (February 28, 1986). *A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues* (referred to as *Ekstedt, 1986*). Canadian Sentencing Commission (April 21, 1986). *Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives?* (referred to as *Ekstedt 1986a*).
- ^{2.} Canada (1982). *The Criminal Law in Canadian Society*. Ottawa: Government of Canada.
- ^{3.} S.C. 1972, c. 13, s. 57.
- ^{4.} 52 Vic., c. 44 (cited by Ekstedt and Griffith, 1984; 61).
- ^{5.} S.C. 1968-69, c. 38, s. 75.
- ^{6.} The *Criminal Code*, 1892, 55-56 Vict., c. 29, s. 971. A recognizance is a legal undertaking in writing signed by the offender which sets out the time and date at which the accused is next required to appear in court as well as other conditions ordered by the court. In the event that the offender breaches the terms of the recognizance, the Crown may apply for forfeiture of the sum of money or goods pledged. A recognizance may be with or without sureties and with or without deposit. See sections 453, 453.1, 453.3, 454(1), 455.3, 457 of the *Criminal Code* and Forms 8.3 and 28.
- ^{7.} Subsection 668(1) of the 1961 *Criminal Code* prohibited the imposition of probation if the offender had a previous record. Subsection 668(3) stated that notwithstanding this provision, probation could be imposed where an offender had one previous conviction provided that conviction was at least five years old.
- ^{8.} S.C. 1968-69, c. 38, s. 75.
- ^{9.} ss. 663(1)(a)(b)(c).
- ^{10.} ss. 664(2)(b).
- ^{11.} ss. 663(1).
- ^{12.} 33-34 Elizabeth II, c. 19.
- ^{13.} S.C. 1985, c. 19, s. 157 and s. 158.
- ^{14.} S.C. 1985, c. 19, s. 157.
- ^{15.} S.C. 1985, c. 19, s. 157.
- ^{16.} See the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, ss. 445-446.2, particularly s. 446.2.
- ^{17.} S.C. 1985, c. 19, s. 156.
- ^{18.} S.C. 1985, c. 19, s. 155 creates the new section 646.1. The latter provides as follows:
 646.1 (1) An offender, other than a corporation, against whom a fine is imposed in respect of an offence may, whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine, discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose by the Lieutenant Governor in Council
 (a) of the province in which the fine was imposed; or
 (b) of the province in which the offender resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed.
 (2) A program referred to in subsection (1) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.
 (3) Credits earned for work performed as provided by subsection (1) shall, for the purposes of this Act, be deemed to be payment in respect of a fine.

- (4) Where, by virtue of section 651, the proceeds of a fine belong to Her Majesty in right of Canada, an offender may discharge the fine in whole or in part in a fine option program of a province pursuant to subsection (1), where an appropriate agreement is in effect between the government of the province and the Government of Canada.
- ¹⁹ The Law Reform Commission of Canada notes in its working paper on diversion that the effect of the automatic prison term for fine default is that approximately 50% of admissions to provincial and local correctional institutions in certain parts of Canada in recent years have been for fine default. The report notes further:
- Furthermore, several studies indicate that the types of offences for which persons are imprisoned for non-payment of fines are typically "poor people's" offences, such as vagrancy and drunkenness. In other words, the alternative jail term seems to fall discriminatorily on the poor offender. The discriminatory effect of the alternative jail term has been found in several provinces to weigh most heavily on the relatively poorer Indian population.
- Law Reform Commission of Canada (1975). *Diversion*. (Working Paper #7). Ottawa: Information Canada; 32.
- ²⁰ Section 7 of the official draft of the May 4, 1962 American Law Institute Model Penal Code provided as follows:
- (1) The Court shall deal with a person who has been convicted of a crime without imposing a sentence of imprisonment unless, having regard to the nature and circumstance of the crime and history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:
- (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
- (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (c) a lesser sentence will depreciate the seriousness of the defendant's crime.
- ²¹ See, for example, the following documents published by the Law Reform Commission of Canada: *The Principles of Sentencing and Dispositions* (1974), (Working Paper #3). Ottawa: Information Canada; *Restitution and Compensation; Fines* (1974), (Working Papers #5 & 6). Ottawa: Information Canada; *Guidelines; Dispositions and Sentences in the Criminal Process* (1977). Report. Ottawa: Minister of Supply and Services; *Community Participation in Sentencing* (1976). Research Paper. Ottawa: Minister of Supply and Services; *Our Criminal Law* (1976). Report. Ottawa: Minister of Supply and Services.
- ²² The Bill received first reading on February 7, 1984 and subsequently died on the order paper.
- ²³ Enacted by the *Constitution Act, 1982*, as Schedule B of the *Canada Act 1982* (U.K.) c. 11.
- ²⁴ Statistics Canada, Centre for Justice Statistics (1985). *Adult Correctional Services in Canada (1983-84)*. Ottawa: Minister of Supply and Services. Table 6, 33.
- ²⁵ Statistics Canada, Centre for Justice Statistics. (1985). *Adult Correctional Services in Canada. (1983-84)*. Ottawa: Minister of Supply and Services. Figure 39, 113.
- ²⁶ Statistics Canada, Centre for Justice Statistics. (1985). *Adult Correctional Services in Canada (1983-84)*. Ottawa: Minister of Supply and Services. See Table 9, 151; Table 14, 157; and Table 22, 168.
- ²⁷ Task Force on Program Review (1985). *Improved Program Delivery: Justice System*. Study Team Report. Ottawa: Minister of Supply and Services. 323.
- ²⁸ These views were related to the Commission during a consultation on October 9, 1985 with the National Joint Committee of the Canadian Association of Chiefs of Police and the Federal Correctional Services.
- ²⁹ Joint Study of the Government of Canada, Government of Saskatchewan and Federation of Saskatchewan Indian Nations (1985). *Reflecting Indian Concerns and Values in the Justice System*. Report from the Steering Committee. Regina: Government of Saskatchewan.
- ³⁰ See, for example, *R. v. Desmarais* (1971), 3 C.C.C. (2d) 523 (Que. C.A.); *R. v. Johnson* (1972), 6 C.C.C. (2d) 380 (B.C.C.A.); and *R. v. Paquet and Vieno* (1978), 43 C.C.C. (2d) 23 (Ont. C.A.).
- ³¹ See Canadian Committee on Corrections (1969). *Report*. Ottawa: Queen's Printer. 199; Law Reform Commission of Canada (1974) *Fines*. (Working Paper #6). Ottawa: Information Canada. 31; Law Reform Commission of Canada (1977). *Guidelines; Dispositions and Sentences in the Criminal Process*. Report. Ottawa: Minister of Supply and Services. 25.
- ³² *Constitution Act, 1982*, Pt. 1, as enacted by the *Canada Act 1982* (U.K.) 1982, c. 11, as amended.

33. See Canadian Committee on Corrections (1969). *Report*. Ottawa: Queen's Printer. 199; Law Reform Commission of Canada (1974). *Fines* (Working Paper #6). Ottawa: Information Canada. 34; Law Reform Commission of Canada (1977). *Guidelines; Dispositions and Sentences in the Criminal Process*. Report. Ottawa: Minister of Supply and Services. 25.
34. This procedure does not necessarily apply to fines imposed for infractions of provincial statutes. For example, see *Summary Convictions Act*, R.S.B.C. (1974), c. 73, s. 57 as cited in Verdun-Jones, S.N. and Hatch A.J. (1986). *The Fine as a Sentencing Option in Canada*. Ottawa: The Canadian Sentencing Commission. 63.
35. S.C. 1985, c. 19. See section 154, in conjunction with subsection 170(2).
36. The May 22, 1986 decision of Judge Scullion (Provincial Court, the Judicial District of York) was unreported at the date of writing this chapter.
37. See Canadian Committee on Corrections (1969). *Report*. Ottawa: Queen's Printer. 199; Law Reform Commission of Canada. (1974). *Fines*. (Working Paper #6). Ottawa: Information Canada. 33; Law Reform Commission of Canada (1977). *Guidelines; Dispositions and Sentences in the Criminal Process*. Report. Ottawa: Minister of Supply and Services. 26.
38. See *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 70(2). Subsection 70(2)(a) directs a justice who is satisfied that a fine imposed for a provincial offence is unpaid to:
...order that any permit, licence, registration or privilege in respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid.
39. The *British Powers of Criminal Courts Act 1973*, s. 31 (3A) provides as follows:

| Amount of Fine | Maximum Default Period |
|------------------|------------------------|
| \$1-\$50 | up to 7 days |
| \$51-\$100 | up to 14 days |
| \$101-\$400 | up to 30 days |
| \$401-\$1,000 | up to 60 days |
| \$1001-\$2,000 | up to 90 days |
| \$2,001-\$5,000 | up to 180 days |
| \$5,001-\$10,000 | up to 270 days |
| over \$10,000 | up to 365 days |
40. The *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 70(5). The latter provides as follows:
70(5) Imprisonment under a warrant issued under subsection (3) or (4) shall be for three days, plus one day for each \$25.00 or part thereof that is in default, subject to a maximum period of,
(a) ninety days, or
(b) half of the maximum imprisonment, if any, provided for the offence,
whichever is greater.

Chapter 13

Prosecutorial Discretion and Plea Negotiation

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Chapter 13

Prosecutorial Discretion and Plea Negotiation

1. Introduction

This chapter examines the issues of prosecutorial discretion and plea negotiations in the specific context of plea bargaining, which is defined later. However, prior to discussing the specific issues relating to plea bargaining there are a few introductory comments which should be made.

Just as the concept of parole alters the meaning of a custodial sentence, the plea bargaining process potentially undermines the relationship between the seriousness of the actual criminal behaviour and its reflection in a criminal offence or in a sentencing disposition. For example, there is an apparent disparity between the reality of a criminal offence and its legal definition when a more serious charge, such as aggravated assault, is transformed into a lesser charge, such as a simple assault, pursuant to a plea bargain. Both parole and improper plea bargaining contravene the Commission's sentencing goal of achieving real and equitable sentences. The Commission's recommendations illustrate its willingness to support comprehensive changes to the current system in order to achieve the goals of its sentencing policy.

In Chapter 10 the Commission recommended the abolition of parole. In the interests of consistency, a recommendation for the abolition of plea bargaining had to be considered. However, whereas impact analyses have been done on the abolition of parole, there is very little similar research respecting the abolition of plea bargaining. Furthermore, since plea bargaining is an informal process, there is actually not enough knowledge about its effects and implications to warrant drastic changes at this time. Rather than describing actual practice, current pronouncements on plea bargaining consist largely of justifications for its existence and of directives to counsel respecting the conduct of such negotiations. When not concerned with rationalizing plea bargaining, as they so often do, these discussions are prescriptive rather than descriptive of actual practice. In other words, they focus on what the practice should be or should appear to be, as opposed to what it really is.

Finally, other jurisdictions which have implemented sentencing guidelines have found that the impact of plea bargaining on sentencing dispositions

becomes more visible. In Chapter 11, the Commission has recommended the implementation of sentencing guidelines. If, in future, it appeared that these guidelines were being circumvented by plea bargaining practices, it would be incumbent upon the federal and provincial governments to take whatever steps necessary to remedy this problem. The permanent sentencing commission could conduct research and make recommendations to assist the governments in this regard.

2. Definition

There is no definition of plea bargaining in the *Criminal Code*. Therefore, prior to a discussion of the specific problems which arise respecting plea bargaining, it is first necessary to define the various components of the practice.

The Law Reform Commission of Canada (1975; 45) has stated that much of the controversy surrounding plea bargaining results from disagreement as to its elements. The Commission defines a plea bargain as “any agreement by the accused to plead guilty in return for the promise of some benefit”. Research undertaken for the Canadian Sentencing Commission indicated that the word “plea bargain” is really a compendious term used to describe a wide diversity of activities which occur among actors in the court system (*Verdun-Jones and Hatch, 1985; 1*).¹ As discussed later in greater detail, the Commission’s primary concern with plea bargaining focuses on the degree to which the practice undermines its sentencing policy. Thus, it has adopted a very wide definition of the practice to address the exercise of discretion by various actors along the criminal justice continuum. For the purpose of discussion, the Commission has distinguished plea bargaining in terms of three activities:²

Charge Bargaining:

- a) reduction of the charge to a lesser or included offence;
- b) withdrawal or stay of other charges or the promise not to proceed on other possible charges;
- c) promise not to charge friends or family of the defendant.

Sentence Bargaining:

- a) promise to proceed summarily rather than by way of indictment;
- b) promise of a certain sentence recommendation by Crown;
- c) promise not to oppose defence counsel’s sentence recommendation;
- d) promise not to appeal against sentence imposed at trial;
- e) promise not to apply for a more severe penalty;
- f) promise not to apply for a period of preventative detention under s. 688;

- g) promise to make a representation as to the place of imprisonment, type of treatment, etc.;
- h) promise to arrange the sentence hearing before a particular judge.

Fact Bargaining:

- a) promise not to “volunteer” information detrimental to the accused (e.g., not adducing evidence as to the defendant’s previous convictions under ss. 237 and -1 of the *Criminal Code*);
- b) promise not to mention a circumstance of the offence that may be interpreted by the judge as an aggravating factor.

(Verdun-Jones and Hatch, 1985; 3)

Although the elements of plea bargaining are presented above in a particular order, the Commission recognizes that each of these activities may occur at different stages in the criminal justice process. For example, fact bargaining may occur either before charges are laid or just before the sentencing hearing. Similarly, charge bargaining may occur either prior to the institution of charges or just before the entry of a plea.

3. The Focus of the Commission’s Review of Plea Bargaining

The Commission was directed by paragraph (d)(i) of its terms of reference to examine plea bargaining in the following context:

to advise on the use of the guidelines and the relationships which exist and which should exist between the guidelines and other aspects of criminal law and criminal justice, including:

- i) prosecutorial discretion, plea and charge negotiation.**

As indicated elsewhere in this report, the Commission’s mandate also directs it to consider relevant policy principles enunciated in CLICS³. Principle (j) in CLICS states that “in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls” (Canada, 1982; 64). It is clear from the discussion of this principle that reference to “controls” contemplates the formulation of substantive and procedural guidelines contained either in statutes or in administrative directives. The discussion specifically states that sentencing guidelines should be developed with a view to reflecting such concerns as “developing appropriate guidelines for Crown prosecutors, governing the laying of charges and negotiation of pleas, in recognition of the extent to which these processes affect the severity and consistency of sentences” (Canada, 1982; 64-65).

Although the goals of equity and accountability mentioned in principle (j) of CLICS are ideals *per se*, they are functionally related to public confidence

in the criminal process. As indicated by one provincial court judges' association, mechanisms to enhance accountability are crucial to the maintenance of public confidence in the criminal justice system:

It is the view of the judges that the key to the maintenance of public confidence in the criminal justice system is the need for open, reviewable exercise of responsibility by the police and the Crown; the integrity of the system depends upon its accountability...On the whole, the concern is that it be seen to operate fairly for all parties and that there be no suggestion of impropriety.

The Commission's concerns about plea bargaining focus primarily on the considerable potential that the practice has to undermine proportionality, equity and certainty in sentencing. If one were to refer to statutory provisions respecting sentencing as the formal legal system, one could describe plea negotiations as the informal criminal justice system. In chapters 9 and 11, the Commission has recommended significant changes to the penalty structure and has proposed guidance for the exercise of judicial discretion. The Commission's sentencing policy expressly encompasses the goals of equity, certainty and uniformity in sentencing. The Commission is of the view that, given the detailed recommendations it has made respecting the formal criminal justice system, it would be irresponsible to ignore the very practice which, if left unchecked, could effectively undermine that system.

The Commission's concern about the potential effect of plea bargaining on its sentencing policy is not precipitated just out of an abundance of caution. Indeed, a survey of Crown and defence counsel conducted for the Commission indicates that the practice of plea bargaining is widespread (Research #5). A study paper prepared for the Law Reform Commission of Canada stated that about 90% of criminal cases resulted in pleas of guilty. The paper also indicated that "plea bargaining has replaced the traditional adversary trial process in the majority of cases dealt with by urban courts" (Law Reform Commission of Canada, 1974; 57). Although other research suggests that the influence of plea bargaining on guilty pleas is not as dramatic as this,⁴ surveys of criminal justice professionals conducted for the Commission confirmed that plea bargaining has a considerable impact upon sentencing decisions. A national survey of judges revealed that 76% of them felt that plea and sentence negotiations have an impact upon the sentencing process or on the sentences that are imposed (Research #6). A similar percentage of Crown and defence counsel made an even stronger statement by indicating that plea negotiations have a major impact upon the sentencing process. A survey of inmates conducted by the Commission also confirmed the perception that plea bargaining is a very common occurrence (Ekstedt, 1985; 46, Landreville, 1985; 16).

4. Prosecutorial Authority

The Commission's review of plea bargaining was circumscribed by jurisdictional and practical limitations. There is no clear assignment of legislative competence for prosecutorial authority given in the *Constitution*

Act, 1867.⁵ Therefore, this question must be answered by reference to subsections 91(27) and 92(14) of the *Constitution Act, 1867* respecting the legislative competence of the federal and provincial governments concerning criminal law.⁶ As indicated in previous chapters, the former subsection confers exclusive legislative authority upon the federal government in relation to criminal law, except the constitution of the courts of criminal jurisdiction.⁷ Subsection 92(14) confers upon the provinces exclusive jurisdiction respecting the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction.⁸

Authority for the prosecution of criminal offences is set out in section 2 of the *Criminal Code* which defines the meaning of “Attorney General”. Section 2 provides as follows:

“Attorney General”

- a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which such proceedings are taken and includes his lawful deputy, and
- b) with respect to
 - i) the Northwest Territories and the Yukon Territory, or
 - ii) proceedings commenced at the instance of the Government of Canada and conducted by him or on behalf of that government in respect of a contravention of or conspiracy to contravene any Act of Parliament other than this Act or any regulation made thereunder, means the Attorney General of Canada and includes his lawful deputy.

Pursuant to subsection 27(2) of the *Interpretation Act*⁹ the provisions of the *Criminal Code* relating to indictable and summary conviction offences apply to indictable and summary conviction offences created by other enactments, except to the extent that the latter otherwise provide.

The current definition of Attorney General is similar to that introduced by the amendment to the *Criminal Code* enacted in 1969.¹⁰ As Stenning notes,¹¹ the intent of the amendment was to reflect long established practice that the federal Attorney General had prosecutorial authority in relation to federal statutes other than the *Criminal Code* while the provinces were responsible for the prosecution of *Criminal Code* offences. However, when read in conjunction with subsection 27(2) of the *Interpretation Act*, the section created ambiguity in the law by giving rise to two possible interpretations of which level of government had prosecutorial authority over criminal offences. One reading of the section would give provincial governments exclusive authority to prosecute *Criminal Code* offences and *concurrent* authority with the federal authorities to prosecute criminal proceedings in the Northwest Territories, the Yukon and those instituted by the federal government. The other reading of the section

would give the provincial authorities exclusive authority respecting the prosecution of *Criminal Code* offences and the federal government *exclusive* authority respecting the prosecution of proceedings instituted in the Northwest Territories and the Yukon and those initiated by the federal government (Stenning, 1985; 169).

In the years which followed, considerable litigation was generated respecting whether the definition of Attorney General in Section 2 of the *Criminal Code* was competent federal legislation.¹² Four constitutional positions emerged respecting the relative authority of the federal and provincial governments to conduct prosecutions for federal offences.¹³ Phillip Stenning concludes that while recent decisions of the Supreme Court of Canada have not conclusively settled the issue, the current position appears to be that the federal and provincial governments have concurrent jurisdiction over the prosecution of federal offences (Stenning, 1985; 189). Further, it appears that this concurrent jurisdiction extends at least to legislation providing for the enforcement and prosecution of offences under the *Narcotic Control Act*, the *Combines Investigation Act* and the *Food and Drugs Act* and is not dependent upon whether the statute containing the offence relies upon the criminal law power of subsection 91(27) of the *Constitution Act* for its constitutional validity (Stenning, 1985; 189).

This rather brief overview of the relative prosecutorial authority of the federal and provincial governments is given to provide a context for the Commission's determination of the scope of its review. The Commission has taken the position that while the legislative authority of federal legislation which purported to subject police and prosecutorial decision-making to judicial scrutiny would probably be upheld, the focus of its inquiry should be restricted to specific mechanisms to enhance accountability and visibility in the conduct of plea negotiations. It has not attempted to give exhaustive guidance respecting the various activities encompassed within its definition of plea bargaining. This approach is consistent with the time and resource limitations faced by the Commission in the course of its review. As a matter of policy, the Commission has decided to focus its recommendations upon those aspects of plea bargaining which bear directly on its sentencing policy and which could undermine the other elements of its package.

5. Issues Relating to Plea Bargaining

The discussion in the chapter will be structured as follows: first, the issues of visibility and accountability in plea bargaining practices will be considered; second, the Commission's policy respecting plea bargaining will be given wherein recommendations will be made to address current problems. The recommendations themselves will relate to the role and activities of specific actors in the plea bargaining process such as victims, the offender, the police, Crown counsel and the judiciary.

5.1 The Visibility of Plea Bargaining

The visibility of plea bargaining relates to the broader question of the visibility of the process by which sentencing decisions are made. The issue is embodied in the age-old maxim that not only must justice be done but it must also be seen to be done. The Commission is of the view that public confidence in the criminal justice system depends in large measure upon enhancing the visibility of decisions made along the criminal justice continuum which affect the final outcome of a disposition for a particular criminal transaction. As noted in Chapter 7, the ultimate sentencing disposition for a particular offence bears little apparent relationship to the original penalty provided for it. This is a problem not only of the current penalty structure but also of the degree to which the public, the victim and the offender are not informed of the process by which discretion is exercised in the determination of sentences. The Commission's recommendations on plea bargaining are premised on the policy that the appearance of justice in the criminal process is as important as the reality of justice. As noted by the Law Reform Commission of Canada (1975; 46):

Justice should not, and should not be seen to be, something that can be purchased at the bargaining table. Neither the public nor the offender can respect such a system. Once the crown has decided in the public interest to prosecute a charge, bargaining for a plea should not be used as a substitute for judicial adjudication on guilt or sentence.

Enhancing the visibility of plea bargaining is really a question of identifying the locus of decision-making. Thus, if the disposition of a case is effectively determined by an agreement between counsel which is approved by the court, the elements of that decision-making process should be indicated in open court. This would help to dispel the perception that court proceedings are a means to legitimate decisions which are made in private.

A disturbing view of the criminal justice system emerged from a survey of 129 inmates in Quebec institutions. These inmates indicated that in their view the outcome of any particular case was "fixed" in advance of the sentencing hearing. The sentencing decision was orchestrated by the police and Crown counsel who worked in collaboration with defence counsel. These inmates were so concerned about the inability of defence counsel to protect their interests in all or most cases that they recommended the appointment of an independent third party to represent their views during plea negotiations (*Landreville, 1985; 43*). The perception of these inmates was that the sentencing court knew of negotiations but feigned ignorance of them and proceeded to go through the motions of judicial decision-making in order to legitimize the "deal". The Commission has taken the position that it would be irresponsible to dismiss these perceptions as merely those of a biased party. The characterization by inmates of the criminal justice process as a coercive "game" only reinforces the need for enhanced visibility of the discretion exercised by actors in that process.

5.2 The Issue of Accountability

One way to distinguish visibility from accountability is that the former relates to exposing the process by which decisions are made whereas the latter concerns the quality of the decisions themselves. However, the low visibility of plea bargaining decisions also facilitates the lack of accountability in the process. As noted by the Law Reform Commission of Canada (1975; 46):

The evils of plea bargaining are magnified by the fact that it is generally conducted in secret. Involuntary pleas by accused persons, or unethical conduct by counsel can occur in the bargaining process. These will not be brought to light in court. What is disclosed in court will, at best, be an incomplete story; at worst, it will be an inaccurate story. Nor can the interests of the public or of the victim be protected if all major decisions in a case are made in secret negotiations.

5.2.1 Current Mechanisms for Accountability

There are various controls on plea bargaining provided by the legal profession (the defence bar), by the practice directives of the federal and provincial Ministers of Justice and/or Attorneys General and by the courts. Subsection 534(4) of the *Criminal Code* empowers the sentencing judge to accept a plea of guilty, with the consent of the prosecutor, to an offence with which the offender has not been charged but which arises out of a transaction for which he or she has been charged. Where the court accepts the plea of guilty to the offence (usually a lesser or included offence to that charged), it must find the accused not guilty of the offence with which he or she has been formally charged. The provision thus gives the court the ultimate power to ensure that plea bargaining discussions are consistent with the ends of justice.

Defence counsel are subject to the Canadian Bar Association Code of Professional Conduct. Chapter VIII, paragraph 10 of that Code provides:

Where, following investigation,

- a) a defence lawyer *bona fide* concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,
- b) the client is prepared to admit the necessary factual and mental elements,
- c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and
- d) the client so instructs him, it is proper for the lawyer to discuss with the prosecutor and for them tentatively to agree on the entry of a plea of “guilty” to the offence charged or to a lesser or included offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be or appear to be sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases, and all pertinent circumstances surrounding any tentative agreements, if proceeded with, must be fully and fairly disclosed in open court. The judge must not be involved in any such discussions or tentative agreements, save to be informed thereof.

Most of the Law Societies of the various provinces have adopted the Canadian Bar Association Code of Professional Conduct.¹⁴ If this Code of Professional Conduct can be considered to be a national standard, there would appear to be a number of requirements which must be met before defence counsel are ethically entitled to advise their clients to plead guilty to an offence.

During the course of its review of plea bargaining, the Commission became aware of literature which suggested that considerable discrepancy exists between these standards and actual practice. Two studies have documented the degree to which offenders are isolated from penal negotiations and of their dependency on defence counsel for information and opinion.¹⁵ A Canadian study described those dynamics of plea bargaining which discourage defence counsel from fulfilling their professional obligations to their clients. For example, the study indicated that defence counsel must balance two competing interests: satisfying their client and collaborating with other court actors (Ericson and Baranek, 1982; 123). It further suggested that the appearance of a concession is important as a means of inducing the client to accept the guilty plea (1982; 122). In fact, follow-up interviews with defendants in the study revealed that in some cases they were unsure not only of their *legal* guilt but also of their *factual* guilt (1982; 163). Research conducted for the Commission described the phenomenon of illusory bargaining whereby offenders are induced to plead guilty to some charges by their counsel on the understanding that other charges will be dropped. The illusory bargaining occurs in situations where these other charges are in reality duplicate charges and could not be proceeded with in any event (*Verdun-Jones and Hatch, 1985; 21*). These findings, in conjunction with the suggestion of inmates in Quebec that an independent party be appointed to represent their views during plea negotiations, are illustrative of the degree to which plea bargaining prevents, or at least makes it difficult, for counsel to discharge their professional obligations towards their clients.

The Commission had neither the time nor the resources to ascertain the degree to which these findings are applicable to the entire country. However, it has decided to recommend measures designed to discourage the development or growth of these practices and to enhance visibility, clarity and accountability in the plea bargaining process.

The relative isolation of the offender from the plea bargaining process was confirmed by surveys of Crown, defence counsel and inmates conducted for the Commission. Roughly 70% of the Crown and defence counsel canvassed indicated that the offenders play an insignificant role or no role at all in plea negotiations (Research #5). This finding is consistent with the conclusions reached in each of the three inmate surveys conducted for the Commission. The survey of native inmates revealed that, as a starting point, the process of plea bargaining itself was not understood by these offenders (*Morse and Lock, 1985; 39*). The survey further indicated that while 95% of the respondents had legal representation for plea bargaining, 25% of offenders stated that no one explained the process of plea bargaining to them (*Morse and Lock, 1985; 41*).

The survey of inmates in Quebec confirmed the conclusion in the survey of Crown and defence counsel that the offender plays an insignificant role in plea negotiations. The Quebec inmates indicated that they did not participate in plea bargaining: in their words, they are "part of the game but they do not play" (*Landreville, 1985; 23*). The inmates were also of the opinion that there was a direct correlation between counsel's fees and his or her commitment to the case. These findings are cited not as an unchallenged indictment of the legal profession but as evidence of some degree of discrepancy between standards of professional conduct and the practice of some counsel in participating in plea negotiations.

The conduct of Crown counsel is often governed by guidelines and directives. The individual Crown Attorneys are agents of the federal and provincial Ministers of Justice and/or Attorneys General but, as a matter of practice, these elected officials cannot be expected to monitor the decisions of all prosecutors (although that is generally part of their legislatively defined mandate) (*Verdun-Jones and Hatch, 1985; 23*). The Commission wrote to federal and provincial prosecutorial authorities and requested information about directives issued to Crown prosecutors in their respective jurisdictions concerning plea bargaining. Of the 13 prosecutorial jurisdictions contacted, the Commission received oral and/or written information from about half of them. In order to respect the confidentiality of the directives received, the Commission will discuss their content in a general way as opposed to relating the directives of specific jurisdictions.

A number of jurisdictions distinguished "plea bargaining" from the "proper" exercise of prosecutorial discretion. For example, some authorities prohibited Crown counsel from accepting a plea of guilty to a lesser offence or a lesser number of offences on the basis of expediency. Similarly, counsel were frequently prohibited from agreeing to a specific sentence or to withholding facts or the criminal record from the court. These activities were distinguished from the decision to accept a plea of guilty to a lesser offence because of evidentiary difficulties in proving the more serious offence. In some jurisdictions, the decision to withdraw charges or to stay proceedings, though not prohibited *per se*, was subject to the approval of a more senior official within the provincial or federal prosecutorial bureaucracy. In addition, a number of jurisdictions have specific directives concerning the prosecution of particular offences (e.g., impaired driving offences or domestic assaults).

In addition to specific directives respecting plea negotiations, three provinces (Quebec, New Brunswick and British Columbia) have instituted mechanisms to screen charges prior to their being laid or introduced in court. These programs will be discussed in greater detail in the next part of the chapter which deals with possible solutions to some of the problems associated with plea bargaining.

Research conducted for the Commission respecting the effectiveness of formal regulations to govern the conduct of criminal justice professionals concluded that the guidelines lack the enforceability necessary to be effective

deterrents against illicit or prohibited plea bargaining (*Verdun-Jones and Hatch, 1985; 24*).

A third area pertinent to the issue of accountability concerns the charging practices of the police. Research by Ericson and Baranek (1982) establishes a relationship between plea bargaining and multiple or over-charging. In this context, over-charging can occur by laying a more serious charge in the face of evidence which supports a lesser charge or by laying inappropriate multiple charges which arise out of a single criminal transaction. The authors note:

...the police decide to charge with an eye towards outcomes in court. They "frame" the limits as to what is negotiable, and reduce conviction and sentence outcomes by "overcharging", "charging-up", and laying highly questionable charges (p. 71).

The research of Richard Ericson is persuasive in establishing a link between police charging practices and plea bargaining.¹⁶

The above findings accord with the experience of a number of criminal justice professionals whose views were canvassed in the Commission's national survey. Approximately three-quarters of both the defence and mixed groups (professionals who do part-time Crown work) felt that an offender faced multiple charges relating to a single transaction in over 50% of the cases they handled (Research #5). The exception to this finding concerned defence counsel in New Brunswick who, along with the Crown counsel, said this happened in less than 50% of the cases they handled. As noted above, New Brunswick has a mechanism for screening charges prior to their introduction in court.

When questioned about the relationship between police charging practices and plea negotiations, 79% of the defence and 65% of the mixed group indicated that police lay more (or more serious) charges in order to gain a stronger position in plea negotiations. In contrast, 85% of the Crown counsel and 63% of the defence counsel in New Brunswick indicated that this almost never occurs, or occurs in only a few cases (Research #5).

Two of the inmate surveys conducted for the Commission also established a link between police charging practices and plea negotiations. One study suggested that if over-charging were reduced, plea bargaining might also be reduced on the basis that over-charging was used for the purposes of effecting a bargain (*Ekstedt, 1985; 46*). The perception of inmates in Quebec was that the police bring multiple charges in order to maximize the Crown's leverage in plea bargaining. They suggested this was particularly true in jury trials where excessive charging was used to prejudice the jury against the accused (*Landreville, 1985; 35*). These inmates also suggested that police are encouraged to over-charge in order to enhance their statistical performance concerning the number of cases cleared by charge (*Landreville, 1985; 35*). The effect of institutional pressures on police charging practices has been extensively documented by Ericson (1982).

The research of Ericson and Baranek discusses the degree to which the police orchestrate plea negotiations (1982; 129). These authors suggest that because of the dependency of Crown counsel (due to workloads) on the police and the willingness of defence counsel to rely on police information for expedient disposition of cases, the police version of “the facts” governs plea negotiations. This conclusion accords with the perception of inmates in Quebec about the relative influence of the police on the decisions and actions of Crown counsel (*Landreville, 1985; 32*).

The foregoing discussion about the visibility and accountability of decisions made by counsel, Crown prosecutors and police illustrates the degree to which plea bargaining potentially undermines both the appearance and the reality of justice.

6. The Commission’s Policy Respecting Plea Bargaining

Prior to a discussion of the specific recommendations the Commission will make concerning the various actors in the criminal justice process who are either involved in or affected by plea bargaining, there is one preliminary issue to be addressed.

6.1 Abolition/Retention of Plea Bargaining

The current tenor of judicial thinking appears to be that plea bargaining is “not to be regarded with favour”.¹⁷ However, there appears to be very little support for either legislative control or legislative prohibition of plea negotiations amongst the judges, Crown and defence counsel canvassed by the Commission (Research #5, #6).

Two reasons why plea bargaining should be retained have emerged from the literature and submissions studied by the Commission. The first reason is premised on the position that plea bargaining should be retained because it is beneficial *per se*. Proponents of this view argue that plea negotiations are essential because they facilitate the expedient disposition of criminal matters and reduce the costs of criminal justice for both the offender and for society. The strongest advocates of this view maintain that without plea bargaining, the machinery of the criminal court would grind to a halt.¹⁸

The second reason for maintaining plea bargaining is based on an acknowledgement of the problems associated with its abolition. For example, a number of studies have documented distortions in the criminal justice system which emerge with attempts to ban plea bargaining. Research undertaken for the Commission noted two studies which showed that attempts to ban plea bargaining did not lead to its elimination but merely in moving the practice to a different point in the criminal justice process (Church, 1976; McCoy, 1984 cited in *Verdun-Jones and Hatch, 1985; 10, 11*). For example, in one study, the result of a ban on charge bargaining was to encourage judicial involvement

in, and control over, sentence bargaining. The bargaining was not explicit but took the form of suggesting “hypothetical” cases to which the judge would respond with “hypothetical” sentences (Church, 1976 cited in *Verdun-Jones and Hatch, 1985; 9*).

Research undertaken for the Commission concluded that in view of the fact that the criminal justice system is characterized by attempts to achieve many varied and often conflicting goals, it is reasonable to assume that these systems will always generate and perpetuate discretionary decision-making as adaptations to these multiple ends. Plea bargaining appears to allow and facilitate the accommodation of these multiple purposes of criminal justice systems (*Verdun-Jones and Hatch, 1985; 15*). The Commission is in full agreement with this view and has taken the position that it would be far more realistic to recommend methods of enhancing the visibility and accountability of plea bargaining decisions than to recommend the abolition of the practice. These goals guide the Commission’s recommendations respecting the individual actors involved in or affected by the plea bargaining process.

6.2 The Victim

From its study of current literature and research on this topic and from submissions received from various victims’ groups, the Commission was made aware of the degree to which victims have felt excluded, manipulated and even abused by the criminal justice system. The Commission recognizes the potential which undisclosed plea bargaining arrangements have to obscure for victims the visibility and accountability of sentencing dispositions.

In the course of its deliberations on plea bargaining, the Commission considered whether victims should be accorded a status in sentencing proceedings over and above that of other members of the public. Such a status was recognized in the provisions of the Criminal Law Reform Act, 1984 (Bill C-19)¹⁹ which provided for the use of victim impact statements and procedural mechanisms to allow the victim to address the court in particular circumstances. It is important to note that this enhanced status did not go so far as to accord victims an independent status as parties to the sentencing hearing.

The traditional view is that victims do not have a separate status either in plea negotiations or in the sentencing process. Their views and interests traditionally have been represented by Crown counsel as part of a more general duty to ensure that the disposition of criminal cases accords with the proper administration of justice. Crown counsel are not, strictly speaking, the advocates of victims. This position is illustrated by the directive to Crown counsel in one province which provides that the paramount consideration for prosecutors in plea negotiations in accepting a plea of guilty to a lesser or included offence is the proper administration of justice having regard to the rights of the accused, the protection of the public and the interests of the victim.

The Commission considered mechanisms to enhance the involvement of victims in plea negotiations in terms of two alternatives: first, to accord victims an independent status as parties to plea negotiations; and second, to increase the flow of information between Crown counsel and victims. The Commission rejected the concept of victims becoming independent parties in plea negotiations for a number of reasons. Such a recommendation would be inconsistent with the ultimate responsibility of the Attorney General in each province for the prosecution of *Criminal Code* offences. It also could potentially precipitate an adversarial relationship between Crown counsel and victims. The influence which victims would have on plea negotiations if they were accorded a status as independent parties, might be more illusory than real. It may be that such a provision would merely render them more vulnerable to pressure from either the Crown prosecutor or defence counsel respecting a plea bargain. The victim's opportunities to relate his or her version of the facts to the court may well be restricted so as not to disturb the "deal".

The Commission is of the view that there is considerable room for improving the flow of information between Crown counsel and the victim during plea negotiations. Research undertaken for the Commission suggests that involvement of the victim at sentencing may be a method of controlling bargaining because the court will have the opportunity to compare the victim's version of the case with that presented by counsel. This research further suggests that fact bargaining over aggravating circumstances could be lessened by routine victim input (*Verdun-Jones and Hatch, 1985; 69*).

The Canadian Federal-Provincial Task Force on Justice for Victims of Crime²⁰ recommended that, when requested to do so, prosecutors should ensure that victims are informed of the outcome of plea bargaining. However, the report recommended that Crown counsel should retain the discretion not to divulge the reasons for the agreement if it would be contrary to the public interest to do so. Some mechanism for victim participation or consultation in plea bargaining is provided in ten states in the United States (*Waller, 1986; Appendix*). Eight states have provisions for notifying the victim about the plea agreement.

In the context of plea bargaining, the Commission is primarily concerned with the exchange of information between the prosecutor and the victim as opposed to direct or indirect victim input into the sentencing hearing. In the Commission's opinion, the provisions in Bill C-19 respecting victim input into sentencing hearings is worthy of further consideration by the government when it considers proposals relating to the evidentiary and procedural aspects of sentencing.

Research on victims undertaken for the Commission recommended that police and prosecutors should set up mechanisms to consult with victims about plea negotiations (*Waller, 1986; 20*). In the context of the relationship between Crown counsel and the victim during the course of plea negotiations the Commission makes two recommendations:

- 13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.**
- 13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.**

6.3 The Offender

In its earlier discussion upon the issue of accountability, the Commission indicated the degree to which the offender is isolated from the decision-making process in plea bargaining and the degree to which he or she is dependent upon his or her counsel for advice and information. As noted previously, some of the problems with plea bargaining practices involve a greater need for some defence counsel to disclose options and information to their clients. The Commission has taken the position that it is outside the terms of its mandate and also outside the purview of federal legislative competence to enumerate a code of professional conduct for counsel involved in plea negotiations.

An alternative mechanism for attempting to increase the visibility of plea bargaining for the offender is to determine, prior to the imposition of sentence, whether the offender is voluntarily and knowingly pleading guilty to an offence. Canadian jurisprudence has confirmed the necessity of the sentencing judge satisfying himself or herself of the voluntariness of the plea of guilty.²¹ A proposal creating a legislative duty on the sentencing court to inquire into the accused's understanding of the plea was rejected as being too restrictive. Also, such a provision would permit an unscrupulous offender to manipulate the system by claiming that he or she did not understand a plea bargain which in fact had been understood but which the offender subsequently wished to reject.

- 13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.**

Standing alone, this recommendation may appear to add little to current practice. However, when considered in the context of the Commission's recommendations respecting disclosure of plea agreements, it is anticipated that it will help to demystify the plea bargaining process for offenders.

6.4 The Police

The relationship between police charging practices and plea bargaining is important to the Commission's sentencing policy because it affects the quality of charges presented to the court. Consistency between the factual elements of a crime and its description as an offence is obviously important to preserving the integrity of a sentencing scheme which is rooted in the principles of proportionality and equity. As noted earlier, police charging practices have a very important role in shaping plea negotiations and thus provisions to maximize the quality of charges are worthy of specific consideration.

The Commission has focused on three mechanisms to enhance the quality of police charging. The Commission is not concerned with multiple charges *per se* but with charges which are inflated or duplicated for the purpose of maximizing leverage in plea negotiations.

The first recommendation made by the Commission concerns the formulation of guidelines by federal and provincial prosecutorial authorities respecting over-charging and inappropriate multiple charging. The Commission encourages collaboration amongst authorities in the formulation of these guidelines to ensure, to the greatest extent possible, that they are uniform across the country.

13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.

One model for consideration is patterned after guidance developed by the Washington Sentencing Guidelines Commission. The Canadian Sentencing Commission is suggesting these guidelines as examples of the types of directives which could be formulated by the relevant federal and provincial authorities. The Commission is not hereby proposing that prosecutorial guidelines should be embodied in legislation. The guidance in the Washington system is as follows:

Selection of Charges/Degree of Charge

- (1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offences may be charged only if they are necessary to ensure that the charges:
 - a) Will significantly enhance the strength of the state's case at trial; or
 - b) Will result in restitution to all victims.
- (2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:
 - a) Charging a higher degree;
 - b) Charging additional counts.

This standard is mentioned to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of the defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication.

Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.²²

Other proposals for consideration have been taken from directives currently in place in some provinces. For example, one province has formulated the following policy on multiple charging practices:

- a) In any given factual situation the prosecution should proceed only with the *most* appropriate charge or charges.
- b) Charges more serious than disclosed should not be laid to induce guilty pleas to lesser offences.
- c) Charges should not be reduced merely to facilitate the handling of a case, without good justification for the reduction. A check with head office is recommended.

The wording of the directive could be modified to reflect its nature as an instruction to police on charging practices.

The second mechanism recommended by the Commission to enhance the quality of police charging practices concerns the institution of a process to screen charges prior to their being laid by police. Such a mechanism is currently in place in British Columbia, Quebec and New Brunswick. For example, in New Brunswick, the Public Prosecutions Policy Manual directs Crown counsel to scrutinize and give their consent to all charges before they are laid by the police.

The manual indicates that the prosecutor's major role is to determine whether a criminal offence is disclosed by the police investigation, whether a *prima facie* case is made out and whether a prosecution is justified in the circumstances. The manual directs the prosecutor to insist upon being provided with a full police report or court brief in order to make these decisions. The manual re-affirms the absolute right of police officers to lay charges, even in the face of opposition from Crown counsel. In these circumstances prosecutors are directed to contact more senior officials to determine whether the charges should be stayed. The manual strictly prohibits Crown counsel from engaging in plea bargaining.

It seems that the screening mechanism has discouraged plea bargaining in New Brunswick. The sample of Crown and defence counsel from that province were the only respondents in a national survey of criminal justice professionals to indicate that plea negotiations had a minor impact upon the sentencing process (Research #5). Also, Crown counsel from New Brunswick were the only prosecutors to indicate a provincial policy of prohibiting the conduct of plea negotiations in relation to specific offences. Most dramatically, the New Brunswick Crown and defence counsel were the only respondents who indicated that the police do not lay more or more serious charges in order to gain a stronger position in plea negotiations (Research #5).

The Law Reform Commission of Canada (1976; 56) has recommended that the prosecution should be involved in the charging process.

13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.

In making this recommendation the Commission is aware of the difficulty of requiring in northern and remote areas that charges be screened by Crown counsel in all cases. Certainly the screening process for each jurisdiction could be modified to reflect the specific needs and problems which arise in that area. Also, as indicated in the description of the New Brunswick process, the preparation of full and accurate police reports is important to the ability of Crown counsel to effectively screen charges. Thus, if governments are seriously committed to improving the quality of charges and of reducing the abuses of plea bargaining generated by inappropriate or excessive charges, they must provide sufficient resources to enable law enforcement officials to prepare full and accurate police reports.

Finally, the third avenue which the Commission is recommending for the improvement of charging practices is the need for greater and improved internal review mechanisms within the police forces themselves. The Ouimet Committee proposed that guidelines should be enunciated by senior officials in police forces respecting the exercise of police discretion to invoke the criminal process.²³ The Law Reform Commission of Canada has made recommendations respecting the exercise of police discretion, although these proposals relate primarily to the diversion of offenders from the criminal process entirely. However, one of their recommendations pertinent to the quality of police charging practices is as follows:

We recommend: that ministers responsible for policing, charge their police commission with the development of police guidelines on the appropriate use of discretion. These guidelines should provide the framework for the development of specific instructions by police departments in relation to actual community resources. There is a role for the federal government in assisting in the development of model schemes (Law Reform Commission of Canada, 1976; 55).

Therefore :

13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.

6.5 Crown Prosecutors

The ultimate discretion respecting the prosecution of criminal charges is vested in the Crown prosecutor.²⁴ These counsel thus have the greatest ability to either enhance or obscure the visibility of plea bargaining practices for the public and the victim.

The Commission's recommendations focus on two proposals to enhance the visibility and accountability of the exercise of prosecutorial discretion. The first relates to the formulation of guidelines respecting the exercise of this discretion. The second addresses specific procedures to disclose the contents of the plea bargain to the court. The Canadian Association of Chiefs of Police indicated in its brief to the Commission that the current directives from the office of the various Attorneys General are not effective controls against improper alteration of charges by Crown counsel during the course of plea bargaining. The Association recommended additional controls over the discretionary power of the Crown to redefine the essential nature of criminal cases either by substituting lesser charges for more serious ones or by accepting guilty pleas respecting one or more minor offences in exchange for the withdrawal of one or more charges of greater severity. The Association further recommended that where the charge, as originally laid, is properly supported by available information, no substitution or selective prosecution of minor charges for more serious matters should be permitted. They also suggested that in the event of a guilty plea, all factors, both those agreed upon and those which could be proved if disputed, should be brought to the attention of the judge and the practice of submitting an agreed statement of facts should be abolished.

The Law Reform Commission of Canada has recommended that the Attorneys General of the provinces and territories develop and publish policy guidelines for charging, pre-trial settlements and the conduct of prosecutions (1977; 56). The Canadian Sentencing Commission has taken the position that, to the greatest extent possible, there should be uniformity of approach across Canada respecting plea bargaining practices. This can be effected through collaboration amongst federal and provincial authorities in the formulation of guidelines. The Commission agrees with the spirit of the Law Reform Commission recommendation that greater visibility should be given to directives concerning the general exercise of prosecutorial discretion.

In a national survey of judges conducted by the Commission, 52% of the respondents favoured some change in the way prosecutorial discretion is exercised and controlled (Research #6). This position is consistent with the submission of one of the provincial court judges' associations which contended that consideration should be given to provisions which might restrict prosecutorial discretion in appropriate cases, e.g., to avoid the abuse of the Crown laying an information for a lesser offence in the face of facts supporting a more serious offence.

13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.

13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.

The above recommendations are concerned with the exercise of prosecutorial discretion rather than with the disclosure of plea bargaining decisions *per se*. In examining the latter issue, the Commission considered a number of proposals. One possible approach is to formalize the plea negotiation process through specific channels and/or by reference to a plea bargain agreement. One recommendation advanced in Australia is to formalize plea negotiations with the object of reaching a plea agreement.²⁵ Under this scheme, negotiators would conduct negotiations on a without prejudice basis with the proviso that any clear and unequivocal admission by the accused (in writing and witnessed by that person and his negotiator) would be admissible as evidence in any proceedings. Disputed matters could be referred to a judge or magistrate in open court or, on consent of all parties, in chambers. On a referral of a disputed matter, the court would be empowered to express its view in the presence of both negotiators on any one or more of the following: the relevant law; the attitude of the parties and their negotiators; the desirability of an agreement being reached; available sentencing options (either in general or specific terms); and the admissibility of evidence and the procedure to be adopted at trial. The content and effect of the plea agreements would also be the subject of specific enumeration.²⁶

There was support among inmates for the plea bargaining process to be more open and for the judge to be a participant in it (*Landreville, 1985; 43*); (*Ekstedt, 1985; 46*). The Quebec inmates supported the idea of formalized plea negotiations held in the presence of the parties, an independent negotiator for the offender (aside from defence counsel) and the judge. The inmates contended that the latter should preside at the negotiations. The inmates recommended that any agreement reached as a result of the negotiations should be reduced to writing (*Landreville, 1985; 43,44*). Formal plea agreements are also provided in the *Washington Sentencing Reform Act, 1981*.²⁷

The Commission has taken the position that it would not be helpful to recommend a formalized plea negotiation process or the mandatory use of written plea agreements. Some of the elements of these schemes are useful, however, as examples of the kinds of provisions which could be used in the Canadian context in order to enhance the visibility of the plea negotiation process.

13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain

agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

The “mechanism” referred to in the Commission’s recommendation could take a variety of forms. One possibility is that the prosecutor could be required to make an oral presentation to the court indicating the facts which the Crown is in a position to prove respecting the offence and why the charge to which the offender proposes to plead guilty is appropriate. This presentation could include an undertaking by the Crown that efforts had been made to contact the victim, and that the Crown had considered a report from the victim respecting the impact of the offence. These matters would be disclosed in open court unless, in the public interest, they should be disclosed in chambers. Formal or informal directives could be drafted respecting examples of situations where it would be considered to be contrary to the public interest to openly disclose the reasons for the acceptance of a plea bargain (e.g., where disclosure of the offender’s cooperation in a criminal investigation would jeopardize the investigation or the safety of either the offender or of third persons). To ensure that the offender had been fully apprised of the proceedings, defence counsel could be required to confirm to the court that he or she had fully discussed the plea negotiations with the offender and that the offender understood the consequences of entering a plea of guilty. The court could be directed to verify these matters through oral examination of the offender.

Another mechanism for disclosing the contexts of plea negotiations would be to require the above-noted information to be reduced to writing and submitted to the court. In accepting a plea agreement, the court would be required to verbally indicate the factors which it had relied upon in accepting the agreement. Further procedures could be developed to permit information of a sensitive or confidential nature to be exempted from disclosure. The test for such exemption could relate to the degree of prejudice or danger occasioned to the offender or relevant third parties by such disclosure.

These proposals are consistent with Rule VIII, paragraph 10 of the Canadian Bar Association Code of Professional Conduct which requires that all pertinent circumstances surrounding any tentative agreement must be fully and fairly disclosed in open court.

6.6 The Judiciary

The Commission has taken the position that the judicial review of prosecutorial discretion must be distinguished from the judge’s right to ask for more or better information during the course of the sentencing hearing. The latter relates to evidence and procedure at the sentencing hearing and thus is outside the Commission’s mandate.

There is jurisprudential authority for the proposition that the sentencing court should not be an active participant in plea negotiations either in

chambers or in open court.²⁸ This does not preclude the court from being advised in chambers of information which cannot, in the public interest or specific interest of the offender, be revealed in open court.²⁹ There is conflicting judicial opinion in Canada respecting whether it is proper for the sentencing judge to indicate, prior to a plea, whether he or she agrees with the sentence proposed by one of the parties.³⁰ There is clear authority in Canada for the acceptance of a joint submission by counsel.³¹ Further, it is clear that the trial or sentencing court has authority to decline to follow a joint submission or a submission made by the Crown or defence pursuant to a plea bargain.³²

The survey of sentencing judges conducted by the Commission found that 58% of judges indicated that they were never involved in plea and sentence negotiations (Research #6). This finding is consistent with the views expressed by Crown and defence counsel in the Commission's survey of these professionals. Over 80% of the respondents said that most plea negotiations are initiated by defence counsel (Research #5). In the experience of most respondents, judges do not play a very active role in plea negotiations (Research #5). Eighty-nine percent of both the defence and Crown counsel and 100% of the mixed group stated that the judge is never directly involved, or is occasionally involved either in chambers or in court. However, respondents from both Ontario and Quebec were less likely than respondents from other provinces to say that the judge is never involved. It appears from the questionnaire that judges tend to favour submissions from both the defence and Crown to the type or quantum of sentence to impose. The vast majority of respondents stated that judges will always, or in most cases, accept a joint submission in cases where there have been plea negotiations. While the defence and mixed groups in the survey approved of cases where judges give an advance indication of the sentences they are likely to give, Crown counsel did not. The majority of respondents in all groups disapproved of cases where the judge participates in the negotiations (Research #5).

The finding in the survey of criminal justice professionals that judges generally do not play a very active role in plea negotiations is in direct conflict with the perception of inmates which emerged from the inmate surveys that the judge is the most important actor in the sentencing process (*Ekstedt, 1985; 35*).

The issue of the role of the judge in the plea negotiation process can be distinguished in terms of two activities: active judicial participation in plea negotiations and judicial review or acceptance of agreements which have been reached by Crown and defence counsel. Rule VIII, paragraph 10 of the Canadian Bar Association Code of Professional Conduct indicates that the judge should not be actively involved in plea negotiations. A similar provision is found in the reform proposals of various foreign jurisdictions studied by the Commission.³³

The basic concern with active judicial participation in plea bargaining is the erosion of the judge's role as an objective, non-partisan arbitrator. One rationale for involving the judge in the negotiation process is that it would

enhance the intelligence of the guilty plea by informing the defendant of the anticipated sentence prior to the entry of the plea. However, as one study notes, the actual effect of such intervention could have the opposite effect. This research suggests that because the judge is an authoritative, dominating figure in the process (which is confirmed by the results of the inmate survey in British Columbia concerning inmate perception of the importance of the judge in sentencing), the court's intervention could effectively coerce the accused into accepting the agreement and pleading guilty.³⁴ The paper further notes that the coercive nature of judicial participation in plea negotiations could impair the voluntariness of the defendant's participation in the bargaining process. The latter is essential to the self-determination value of plea bargaining.³⁵ This study also suggests that judicial involvement in plea negotiations could shift the focus of bargaining from the two parties to the judge and the parties. The result could be a mini-trial with its inherent evidentiary and procedural complications.³⁶

The Law Reform Commission of Canada assesses judicial involvement in plea negotiations in the following terms:

In a sense, judicial involvement in plea bargaining is the worst possible approach to the problem. It is an approach that should legitimize as a legal institution a practice which degrades the administration of justice (1975; 48).

One of the provincial court judges' associations indicated in its submission to the Commission that the majority of judges do not agree with an in-court plea bargaining process in which the judge is an active participant.

In the view of all of the above considerations, the Commission makes the following recommendations:

- 13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.**
- 13.11 The Commission recommends that the *Criminal Code* be amended to expressly provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.**

If adopted, it is anticipated that recommendation 13.11 would complement the current subsection 534(4) of the *Criminal Code* by addressing the issue of agreements reached between counsel which relate to matters other than the acceptance of a plea of guilty to a lesser or included offence.

The issue of judicial approval of agreements reached independently by the parties must be considered in the context of the recent enactment of section 553.1 of the *Criminal Law Amendment Act, 1985*³⁷ which requires a pre-

hearing conference to be held in any case which is to be tried with a jury. The conference is to be held to “consider such matters as will promote a fair and expeditious trial”. The provision is permissive with respect to non-jury proceedings and permits such a hearing to be held with the consent of all the parties. It must be stressed that pre-trial conferences are not *per se* forums for plea bargaining. The purpose of the pre-trial conference is to narrow the issues which are in dispute and thereby more accurately predict the time needed for the disposition of the matter by trial. At the pre-hearing conference, defence counsel obtains disclosure of the Crown’s evidence and the prosecution has an opportunity to assess the strength of its case. These assessments may induce the parties to conduct plea negotiations.

As noted by the submission of one provincial court judges’ association, the major concern about pre-hearing conferences is the issue of public accountability for decisions reached at these hearings. In the Commission’s view, there are two issues respecting the pre-hearing conferences: the judge’s role in such negotiations; and mechanisms to enhance the visibility of decisions reached at pre-hearing conferences. It is the Commission’s position that in view of the recent enactment of section 553.1 of the *Criminal Code*, the court should be empowered to consider agreements which have been formulated by the parties as a result of the pre-hearing conference. However, section 553.1 should not be used to compel the parties to enter into plea negotiations.

The earlier discussion and recommendation for disclosure of plea agreements in open court applies equally to the specific issue of enhancing the visibility of plea agreements reached in camera. However, additional proposals may be worthy of consideration to specifically address the disclosure of discussions at the pre-hearing conferences which have resulted in a plea agreement. One such provision advanced in the submission of a judge who has had considerable experience with pre-trial proceedings, is a suggestion that no disposition or order arising out of the pre-hearing conference should be made except with full disclosure in open court of the facts and considerations upon which such disposition or order was based.

13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.

The Commission’s policy respecting judicial involvement in plea bargaining may be summarized as one of discouraging active judicial participation in decisions which precipitate or finalize such bargains. However, this does not preclude the judiciary from considering plea agreements which have been reached independently by the parties pursuant to a pre-hearing conference or private negotiations. In all but the most exceptional cases, the facts and considerations which have led the parties to accept the agreement should be disclosed in open court.

7. Information Requirements

In its opening remarks in this chapter the Commission referred to the paucity of information concerning the effects and implications of plea bargaining. Research undertaken for the Commission recommended that an in-depth analysis of the nature and extent of plea bargaining in Canada should be conducted (*Verdun-Jones and Hatch, 1985; 53*). The Commission is in agreement with this proposal.

13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada be conducted by the federal and provincial governments or by a permanent sentencing commission.

Information on current plea bargaining practices will also be pertinent to future assessments of the impact of the practice on the Commission's proposed sentencing guidelines.

8. Conclusion

In the foregoing discussion, the Commission has considered the degree to which plea bargaining has the potential to undermine its formal sentencing policy and public understanding of the sentencing process. For example, the principle of proportionality in the assessment of sentences may be circumvented by charging practices which unjustifiably encourage pleas to lesser offences. Similarly, predictability, clarity and uniformity of approach in reaching sentencing decisions can be undermined by a practice which primarily takes place in private.

The Commission's policy respecting prosecutorial discretion and plea negotiations focuses on enhancing the visibility of the process by which plea agreements are made as opposed to giving detailed guidance respecting the exercise of police and prosecutorial discretion in particular circumstances. It is the Commission's view that increased visibility will encourage greater public accountability of the actors involved in the plea bargaining process. The Commission's recommendations respecting the mechanisms to effect these goals are of a general nature. The Commission is of the opinion that federal and provincial prosecutorial authorities are the most appropriate bodies to give detailed guidance to the police and prosecutors respecting the exercise of discretion which bears upon plea negotiations. The Commission is hopeful that through mutual co-operation they may be able to formulate national guidance on basic plea bargaining practices. This will ensure, to the greatest extent possible, that there is equity and consistency in the criminal justice system's informal response to the disposition of criminal charges.

9. List of Recommendations

13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage

uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

- 13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.
- 13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.
- 13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.
- 13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.
- 13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.
- 13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.
- 13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.
- 13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.
- 13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to

indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.

- 13.11 The Commission also recommends that the *Criminal Code* be amended to *expressly* provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.
- 13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.
- 13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada should be conducted by the federal and provincial governments or by a permanent sentencing commission.

Endnotes

- ^{1.} Verdun-Jones, S. and Hatch, A.J. 1985. *Plea Bargaining and Sentencing Guidelines*. Ottawa: *The Canadian Sentencing Commission*. The Commission drew heavily from this report in the course of formulating its recommendations on plea bargaining.
- ^{2.} *Verdun-Jones and Hatch*, 1985; 3.
- ^{3.} Canada (1982). *The Criminal Law in Canadian Society*. Ottawa: Government of Canada.
- ^{4.} This conclusion is contradicted by research undertaken for the Commission. The research criticizes "many commentators who erroneously assume that 90% of the conviction rates in most jurisdictions are the result of guilty pleas and that almost all of these are the result of plea bargaining" (*Verdun-Jones and Hatch*, 1985; 7).
- ^{5.} Schedule B of the *Canada Act*, 1982 (U.K.), c. 11.
- ^{6.} Stenning, P.C. (1985). *Appearing for the Crown*. Montreal: Browns's Legal Publications, 166.
- ^{7.} Subsection 91(27) provides as follows:

Powers of Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

- ^{8.} Subsection 92(14) provides as follows:

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say -

(14) The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

- ^{9.} R.S.C. 1970, c. I-23, Subsection 27(2) provides:
(2). All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.
- ^{10.} S.C. 1968-69, c. 38, s. 2(1) cited in Stenning, P.C. (1985). *Appearing for the Crown*. Montreal: Brown's Legal Publications, 167.
- ^{11.} Stenning, P.C. (1985). *Appearing for the Crown*. Montreal: Brown's Legal Publications, 168.
- ^{12.} See *Re Collins and The Queen* (1973), 13 C.C.C. (2d) 172 (S.C.C.); *R v. Pelletier* (1974), 18 C.C.C. (2d) 516 (S.C.C.); *R v. Hauser* (1979), 8 C.R. (3d) 89 (S.C.C.); *R v. Aziz* (1981), 57 C.C.C. (2d) 97 (S.C.C.); *A.G. of Canada v. C.N. Transportation Ltd. et al.*; *A.G. of Canada v. C.P. Transport Co. Ltd. et al.* and *A.G. of Ontario et al.* (1983), 7 C.C.C. (3d) 449 (S.C.C.); *R v. His Honour Judge Wetmore and Attorney General for Ontario et al.* (1983), 7 C.C.C. (3d) 507 (S.C.C.).

13. Phillip Stenning describes these four constitutional positions as follows:
 - (1) Legislative competence with respect to the prosecutorial function in relation to *all* federal laws, regardless of their constitutional basis in Section 91, might be held to be reserved exclusively to the federal Parliament. This was the "extreme federal" position.
 - (2) Legislative competence with respect to the prosecutorial function in relation to *all* federal laws, regardless of their constitutional basis in Section 91, might be held to arise from the "administration of justice in the province" power under Section 92(14), and thus to be reserved exclusively to the provincial legislatures. This was the "extreme provincial" position.
 - (3) If a "special relationship" was recognized to exist between Sections 91(27) and 92(14), legislative competence with respect to the prosecutorial function might be held to be reserved exclusively to the provincial legislatures under Section 92(14) with respect to all "criminal" prosecutions, but reserved exclusively to the federal Parliament under Section 91 with respect to all prosecutions under federal laws which did not depend on the "criminal law power" of Section 91(27) for their constitutional validity. This was the "separate jurisdictions" position.
 - (4) Legislative competence with respect to the prosecutorial function might be held to arise *both* from the federal "criminal law power" under Section 91(27) *and* from the provincial "administration of justice in the province" power under Section 92(14), being an aspect of each head of legislative authority. In this case, both the federal Parliament and the provincial legislatures might be held to have constitutional authority to enact legislation with respect to the prosecutorial function in cases under federal laws. Under such circumstances, the constitutional doctrine of "paramountcy" would operate, according to which valid federal legislation would be recognized as paramount over otherwise valid provincial legislation on the same matter, to the extent that there was inconsistency between the two and to the extent of such inconsistency. In such circumstances, federal legislation would be held to have "occupied the field" and inconsistent provincial legislation, while not constitutionally invalid, would be held to be "inoperative". This was the "concurrent jurisdiction" position, and could be argued for in one of two forms. Either "full concurrency" over the prosecution function with respect to prosecutions under *all* federal laws could be recognized, or a more limited concurrency, which was confined to the prosecution function with respect only to prosecutions under laws which depend for their constitutional validity on the "criminal law power" of Section 91(27), could be recognized. For those who argued for "partial concurrency" only, legislative authority in relation to the prosecution function with respect to "non-criminal" federal laws, was held to reside exclusively with the federal Parliament.

Cited in Stenning, P.C. (1985). *Appearing for the Crown*. Montreal: Brown's Legal Publications, 172-173.

14. The Commission wrote to the various provincial law societies and requested information about directives concerning plea bargaining. Of the provinces which responded to the Commission's written and oral inquiries, the following jurisdictions had adopted the Canadian Bar Association Code of Professional Conduct: New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Manitoba, Saskatchewan, the Yukon and the Northwest Territories. Only British Columbia had developed its own code of professional conduct for legal counsel in that province.
15. Ericson, R. and Baranek, P. (1982). *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*. Toronto: University of Toronto Press; see also Baldwin, J. & McConville, M. (1977). *Negotiated Justice: Pressures on Defendants to Plead Guilty*. London: Martin Robertson.
16. Ericson, R. (1981). *Making Crime: A Study of Police Detective Work*. Toronto: Butterworths.
17. The Comments of Mr. Justice Hugessen in *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.) at pages 92-93.
18. Judge Graburn's comments in Law Society of Upper Canada Special Lectures (1969), p. 301 cited in Ferguson, G. and Roberts, D. (1974). Plea Bargaining Directions for Canadian Reform. *Canadian Bar Review*, 3, 521.
19. Bill C-19 received first reading on February 7, 1984 and subsequently died on the order paper.
20. Canadian Federal-Provincial Task Force on Justice for Victims of Crime (1983). *Report*. Ottawa: Minister of Supply and Services, 128.
21. *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.), at pp. 92-93.
22. State of Washington Sentencing Reform Act of 1981 cited by *Verdun-Jones and Hatch*, (1985). Appendix D, 104.
23. Canadian Committee on Corrections (1969). *Report*. Ottawa: Queen's Printer, 46.

24. See *R v. Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.); *Re Baldwin and Bauer and The Queen* (1980), 54 C.C.C. (2d) 85 (Ont. H.C.J.); *R v. Stanger*; *R v. Bramwell* (1983), 7 C.C.C. (3d) 337 (Alta. C.A.); *R v. Saikaly* (1979), 52 C.C.C. (2d) 191 (Ont. C.A.). This position is also expressly represented in the various provincial statutes governing the actions of Crown prosecutors. See, for example, *Department of the Attorney General Act*, R.S.A. 1980, c. D-13, s. 2(h); *The Department of Justice Act*, R.S. Nfld. 1970, c. 85, s. 10(c).
25. Borick, K. (1985). *Plea Bargaining*. Paper presented to the International Criminal Law Congress, October 6-11, 1985, Adelaide, Australia p. 29.
26. Borick, 1985; 30.
27. Cited in *Verdun-Jones and Hatch*, 1985; Appendix D.
28. See *R v. Wood* (1975), 26 C.C.C. (2d) 100 (Alta. C.A.); see also Panel Session on Plea Discussions, Law Society of Upper Canada Special Lectures (1969), p. 299 at p. 307 cited by Ferguson G. and Roberts, D. (1974) *Plea Bargaining: Directions for Canadian Reform*. *The Canadian Bar Review*, 3, 555.
29. Ruby, C. (1980). *Sentencing*. (2nd ed.) Toronto: Butterworths, 76.
30. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell 542 – 543.
31. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell, 541; see also *R. v. Simoneau* (1978), 40 C.C.C. (2d) 307 (Man. C.A.).
32. Nadin-Davis, P. (1982). *Sentencing in Canada*. Ottawa: Carswell, 541; see also *Brosseau v. The Queen*, [1969] S.C.R. 181; (S.C.C.) *Adgey v. The Queen* (1973), 23 C.R.N.S. 298 (S.C.C.); *R. v. Pooley* (1974), 27 C.R.N.S. 63 (B.C.S.C.); *A.G. Can. v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.).
33. See State of Washington Sentencing Reform Act of 1981 cited by *Verdun-Jones and Hatch*, (1985). See also Victorian Shorter Trials Committee recommendations cited in *Plea Negotiations and Practices* (1985). A paper prepared for the International Criminal Law Congress, October 6-11, 1985, Adelaide, Australia. See also Rules for U.S. District Courts: Rule 11 cited by *Verdun-Jones and Hatch*, 1985; Appendix C.
34. *Harvard Law Review*, (1977). *Plea Bargaining and the Transformation of the Criminal Process*. Vol. 90, No. 3, 585.
35. *Harvard Law Review*, (1977). *Plea Bargaining and the Transformation of the Criminal Process*. Vol 90, No. 3, 585.
36. *Harvard Law Review*, (1977). *Plea Bargaining and the Transformation of the Criminal Process*. Vol. 90, No. 3, 585.
37. S.C. 1985, c. 19, s. 127. Section 553.1 provides as follows:
553.1(1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may, with the consent of the prosecutor and the accused, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing.
(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 438 to consider such matters as will promote a fair and expeditious trial.

Part III

Implementation

Chapter 14

Permanent Sentencing Commission and Implementation Issues

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Chapter 14

Permanent Sentencing Commission and Implementation Issues

As is pointed out elsewhere in this report, many of the problems with the Canadian sentencing process stem from, or are at least exacerbated by, the lack of a clear and coherent sentencing policy. As we have discussed, the piecemeal and inconsistent implementation of policies and programs over the years has militated against a unified approach to sentencing and resulted in inconsistencies and even contradictions among the various components of the system. Inconsistency is further compounded by a lack of co-ordination between the legislative, executive and judicial branches of government, all of whom have a vital role to play in the development and implementation of sentencing policy and programming. There is clearly a need for a specialized body to oversee and co-ordinate sentencing policy in Canada.

One specific and very serious deficiency of our sentencing process and a major contributor to sentence disparity is the lack of adequate information and data to support sentencing decisions. Despite the generally acknowledged need for such information and even a few attempts to organize an adequate information system, the sorry state of the prevailing situation clearly demonstrates the need for a specialized body responsible for the establishment and maintenance of an adequate information system. Considering Canadian history and experience in this regard, it appears most unlikely that we will ever realize the implementation of a satisfactory sentencing information system unless a specialized body is specifically mandated to do the task. This chapter will address the issues relating to the establishment of a permanent sentencing commission and to the development of adequate information systems. It will also address two other issues which are crucial to the implementation of its recommendations. These issues relate to the impact of the Commission's recommendations on the administration of justice by the provinces and some of the steps which should be followed in implementing the Commission's recommendations.

1. The Permanent Sentencing Commission

The Commission is proposing a major reform of the sentencing process in Canada. Given the adoption of these reforms by Parliament and the

Government of Canada there will clearly be a need (as indeed there is in the current system) to monitor closely and evaluate the effectiveness and consequences of the reform measures. Furthermore, there will be the corollary ongoing need for review of maximum penalties, categorization of offences and sentencing range guidelines. Again, it is urged that the only way to ensure that the requisite attention is given to ongoing evaluation and updating is to entrust this task to a specialized body. Co-ordination, evaluation and review are long-term requirements which cannot be accomplished by an *ad hoc* body such as this Commission but rather must be the mandate of one having permanency. Evaluation and review are essential components of effective reform.

As indicated in Chapter 11, the formulation of a comprehensive set of guidelines governing sentence length and ranges will require additional research and consultation. Hence, there is a need for an ongoing body not only to complete the guidelines but to review and update them from time to time as warranted. As previously indicated, other components of our criminal law and sentencing process, such as maximum penalties and categorization of offences, will require continuous monitoring and updating. Again, we stress that if we are to ensure consistency and continuity in this regard these tasks are best entrusted to a specialized body.

A permanent sentencing commission would complement the work of provincial and territorial Courts of Appeal. The Commission would be primarily responsible for the formulation, review and updating of national sentencing guidelines while the Courts of Appeal would be responsible for the application, review and amendment, where necessary, of the guidelines in their respective jurisdictions. The need for such a commission to ensure uniformity and consistency of approach across the country cannot be over-emphasized nor can the crucial role which the Appeal Courts will play in providing direction for the application of the guidelines to particular cases and making needed modifications where warranted. This is the partnership which can best balance the need for greater uniformity and equality of justice in Canada with the maintenance of a sufficient degree of flexibility to allow for individualization of sentences in appropriate cases. In this partnership lies the greatest promise for a uniformity of approach which would reduce unwarranted disparity while retaining the ultimate authority of the courts to determine sentences in particular cases.

All of this suggests a need for a permanent and specially constituted body to overview the entire sentencing process. Due to the importance and complexity of sentencing and the magnitude of the task to be accomplished, it is clear that no body presently in existence could fulfill such a mandate. What is required is a Commission whose sole mandate is sentencing, if we are to achieve the aforementioned reform and information goals. Such a Commission must have the flexibility and capability not only to conduct research but to implement and evaluate reform measures. In addition, such a Commission must possess one other indispensable attribute. Unlike government departments or agencies it must have the high degree of independence necessary to fulfill a leading and co-ordinating role among the various branches and levels of

government and which will allow it to consider and balance the varied and often conflicting views of the numerous institutions, groups and individuals who have an interest in our criminal justice system.

The creation of such a body (although generally with a more restrictive mandate) has proven very beneficial in other jurisdictions, particularly in a number of American states¹. Given the magnitude and diversity of our country, the different levels of government and the various agencies involved in the criminal justice system, there is an even greater need in Canada for effective and ongoing co-ordination in the development and implementation of coherent and consistent sentencing policy. The numerous submissions made to the Commission displayed the highest degree of consensus in suggesting the creation of a permanent sentencing commission.

14.1 The Commission recommends that the *Criminal Code* be amended to provide for the establishment and maintenance of a permanent sentencing commission.

1.1 Duties and Powers

Although, as indicated above, one of the first tasks of the permanent sentencing commission would be to complete the formulation of sentencing guidelines, it would be mandated and authorized to:

- a) Establish and administer a specialized sentencing information system. This would obviously be done in consultation and in co-operation with the Canadian Centre for Justice Statistics, relevant federal and provincial government departments and agencies and would include:
 - the collection of sentencing data from various federal and provincial government sources, the courts, the Canadian Police Information Centre, etc.
 - the analysis and dissemination of sentencing data to sentencing judges and others involved in the criminal justice system.
 - the evaluation of sentencing guidelines to determine their degree of applicability and relevance in particular cases as well as their effect on the use of incarceration and community sanctions.
- b) Develop and revise national guidelines for presumptive type and range of sentences for specific offences and/or categories of offences.
- c) Make recommendations to Parliament regarding the revision of maximum penalties, the structure of particular offences, the categorization of offences as to degree of seriousness and other matters relating to sentencing.
- d) Make recommendations to the Minister of Justice for the improvement or reform of sentencing laws and procedures.

- e) Provide the Minister of Justice with information, research material and study results concerning sentencing.
- f) Provide (for the purpose of its consideration of any guideline judgment) at the request of a Court of Appeal, information relevant to the establishment and issue of guidelines.
- g) Assist, to the extent possible, members of the judiciary and other criminal justice professionals and administrators with conferences and seminars on sentencing.
- h) Convene members of the judiciary for consultation in the formulation of recommendations regarding consistency of approach in sentencing and the development and revision of sentencing guidelines. Consultation with an advisory council of judges from various levels of courts would be compulsory prior to reporting to the House of Commons.
- i) Consult with federal and provincial governments, the judiciary, bar associations, institutions and persons engaged in teaching and conducting research on matters relevant to criminal law, and other professional or interested organizations and persons including members of the public. This would include inviting proposals and submissions and holding public hearings when necessary.
- j) Initiate and carry out, on its own or by contract, such studies and research as the Commission deems necessary for the proper discharge of its functions.
- k) Prepare each year and submit to the Minister of Justice an annual report of its activities, which the Minister would table in Parliament.

1.2 Structure and Organization:

1.2.1 Membership:

- The Commission would consist of a Chairperson, a Vice-Chairperson and at least five other members for a minimum of seven members.
- All members would be appointed by Order in Council including the designation of the Chairperson and Vice-Chairperson.
- The Chairperson would be a judge and would also be the chief executive officer of the Commission.
- The majority of members would be judges selected from various levels of courts.
- The other members would be selected from as wide a range as possible of relevant constituencies. The membership of the Commission could be set at

greater than seven to ensure adequate representation from interested sectors.

- All members, except the Chairperson, would serve on a part-time basis. The Chairperson would serve full-time, at least at the beginning and thereafter as necessary.

1.2.2 Term of Office:

- Initially it is recommended that varying terms of five, four and three years be established. Thereafter all terms would be three years. This will result in appointments being staggered and thus ensure a measure of continuity.
- A member would be eligible for re-appointment.
- Each member would be removable for cause only by Order in Council.

1.2.3 Remuneration of Members:

- The members of the Commission, except in the case of a person in receipt of a salary under the *Judges Act*², would be paid such salary as is fixed by the Governor in Council or, in applicable cases, reimbursement of salary would be made to the employer.
- All members of the Commission would be paid reasonable travelling and living expenses as fixed by the Governor in Council, while absent from their ordinary place of residence in the performance of their duties.

1.2.4 Staffing:

- The Commission would be authorized to hire such officers and employees as are necessary or advisable for the proper conduct of its work. The Commission would not require a large staff, although initially until a complete set of guidelines is developed a larger staff may be required.
- The Commission would be authorized to engage the services of legal counsel, researchers and other professional and technical advisors or experts as deemed necessary or advisable.
- Support services would be provided as required.

1.2.5 Head Office and Meetings:

- The head office of the Commission would be located in the National Capital Region.

- The Commission would meet as frequently as necessary for the proper conduct of its work but would be required to meet a minimum of three times a year. Meetings could be held in such places as are deemed necessary or expedient.
- A majority of members would constitute a quorum for Commission meetings and decision-making.

1.2.6 Financial and Other Resources:

- All amounts required for the payment of salaries, operation of programs and the operation and administration of the Commission would be paid out of monies appropriated by Parliament for this purpose.
- It is anticipated that excluding the cost of establishing and operating the sentencing information system, for its basic operation and research the Commission would require personnel and financial resources in the vicinity of \$800,000.00 per year. The costs of establishing and operating the sentencing information system are discussed later in this Chapter.
- The Commission would, wherever appropriate, make use of technical and other information, advice and assistance available from departments, branches and agencies of the Government of Canada and every such department, branch and agency would be required to make available to the Commission all such information, advice and assistance as may be necessary to enable it to properly discharge its duties.

1.3 Conclusion

The foregoing discussion underlines the need for a permanent and independent sentencing commission and proposes its basic constitution and operation. Such a commission is felt to be essential to the continued improvement of our sentencing process and the enhancement of equity and justice in sentencing. The cost of establishing and operating such a commission is fairly modest. Given the high cost of operating our criminal justice system in general and the cost of incarcerating offenders in particular, there is no question that the contribution of such a commission to the co-ordination and consistent formulation and application of sentencing policy is of paramount importance. In the long-term the enhancement of social justice and the financial dividends resulting from a unified and consistent approach (e.g., restraint in the use of imprisonment) should greatly outweigh the cost of maintaining such a Commission.

2. Information Systems

After assigning to this Commission the responsibility of investigating and advising on the use of guidelines in sentencing, the terms of reference

acknowledge the importance of sentencing information for carrying out this responsibility. Specifically, the Canadian Sentencing Commission is given the responsibility:

- (e) **to advise, in consultation with the Canadian Centre for Justice Statistics, on the development and implementation of information systems necessary for the most efficacious use and updating of the guidelines.**

This Commission had frequent contact with the Executive Director and various officials of the Canadian Centre for Justice Statistics. In addition, the Commission carried out two separate studies of information systems. First, a detailed study of three sentencing commissions in the United States (Washington, Pennsylvania, and Minnesota) was carried out for the Commission. In conjunction with that project, a member of the staff of the Canadian Centre for Justice Statistics and a member of the research staff of the Canadian Sentencing Commission were able to visit some of these commissions. Second, a detailed study — analyzing the potential needs of a permanent sentencing commission in light of Canadian experience in the area of court data and U.S. experience with sentencing commissions — was carried out for this Commission.

Obviously, as with everything else to do with sentencing, the issues and the recommendations were considered in light of the unique features of the criminal justice system in Canada. Thus, although it was useful to the Commission to know what was going on in other jurisdictions, the structure and needs of the criminal justice systems in the various states that were studied were quite different from those in Canada. In particular, of course, the nature of the guidelines that were implemented by the Commissions in the United States, the meaning of a sentence of imprisonment, the structure of the offences, and the structure and jurisdiction of the trial and appeal courts are all quite different in the United States.

2.1 The Need for Sentencing Information

This report noted in Chapter 3 that sentencing in Canada takes place in a relative vacuum of information about current practice. Neither judges nor policy makers have systematic information about current practice. There are a number of independent reasons why the permanent sentencing commission which has been recommended by this commission will need sentencing information. Among them are the following:

- a) In developing guidelines, one important factor for the permanent sentencing commission to consider is current sentencing practice.
- b) In evaluating the operation of guidelines, the permanent sentencing commission would need to have information about the relationship of actual sentencing practice to the guidelines. For example, information about the proportion of sentences outside

the guidelines and the nature of those cases would help determine whether the guidelines needed to be changed. Thus, the permanent sentencing commission would need sufficient information about each case to evaluate those sentences within, and those departing from the guidelines.

- c) The set of changes recommended by this Commission could have a dramatic and unplanned impact on the size of Canada's prison population if all of the recommendations were not implemented in conjunction with one another. It is important in the short run, and, indeed, in the long run, to collect information on sentencing practices in order to be able to anticipate any undesired changes in imprisonment rates.
- d) The permanent sentencing commission should also provide judges with some detailed information about current practice (see the "guideline sheets" described in Chapter 11).
- e) A sentencing information system that was comprehensive and up to date would allow the permanent sentencing commission to report on a regular basis to Parliament and to the Canadian public on sentencing patterns and on changes in sentencing patterns as the result of having guidelines.
- f) To help identify any other problems in sentencing.

In Canada at the moment, there are no nation-wide systems for making detailed sentencing information available. On a one-time-only basis, this Commission was able to gather sufficient information to make its own recommendations for guidelines on some offences. Such *ad hoc* collections of data are sufficient for some purposes, but are far from ideal.

The ideal is quite simple to describe: using the offender as the unit of analysis, a rather limited amount of information would be gathered on cases for each offender sentenced in a criminal matter in Canada. The advantage of using the offender as the unit of analysis is that it allows the permanent sentencing commission to gather data on sentences and also on the factors which may have led the judge to determine sentence (e.g., the offender's prior criminal record). These data would be collected at the court level using a format which was the same across the country. They would be processed centrally for use not only by the permanent sentencing commission but by others with a legitimate interest in sentencing.

Although such an ideal system is easy to describe, it is not easy to implement. Some of the major difficulties have been described in Chapter 3. Since an ideal national sentencing system is unlikely to exist in Canada within the next decade, some might argue that the implementation of the reforms suggested in this report should be delayed until an adequate sentencing information system is in place. To argue this, however, is to ignore one critical fact: each week in Canada judges are sentencing thousands of people. This is being done in the absence of comprehensive information about sentencing

practice across the country. Hence it is wrong to argue that we should wait; sentencing cannot wait for up to a decade (or more) until complete information might be available.

Sentencing commissions in the United States that have developed extensive presumptive guidelines for criminal offences have often had to do so in the absence of complete and comprehensive information. Often the original guidelines were developed on the basis of detailed knowledge of only a few thousand cases spread across many offences. Initially follow-up information on the impact of guidelines in the United States was usually more complete, but still not ideal. In Canada, the choices are to recommend progress in the absence of complete certainty or to recommend that there be no progress at all. Needless to say, the Commission recommends that we forge ahead with necessary reform.

2.2 An Outline of Information Needs

There are an almost infinite number of dimensions on which cases can vary. Sentencing commissions in other countries have sometimes decided to collect initial data on a very large number of variables. Their reasons for doing this are complex, but in large part seem to be related to the fact that the principles which were to guide sentencing were not fully developed at the time they were collecting initial data. In terms of implementing a sentencing information system to support the recommendations of this Commission, such a large array of information on each case would not be necessary. Indeed, some U.S. commissions have found it impossible to collect data on all variables that they first listed as being important. All that is really necessary is information directly related to the limited number of principles which are being proposed as the guides to sentencing.

A review of the proposals made by this Commission for guiding sentencing decisions would suggest the following as a minimum set of information:

Statistical Data

- a) Offence(s) of conviction.
- b) Sentence(s): type of sanction (e.g., fines, probation, custody).
- c) Sentence(s): *quantum* of sanction (e.g., amount of fine, length of custody).
- d) The rate of sentences complying with and departing from the guidelines.
- e) Variations in the prison population.

Legal Data

- f) Some indication of the seriousness of the particular instance of the offence (as noted, perhaps, by the judge in the reasons for sentence) in relation to the sentence imposed.

- g) An indication of the seriousness of the offender's criminal record, if any, as it was known to the court (as noted, perhaps, by the judge in the reasons for sentence) in relation to the sentence imposed.
- h) Presence of important aggravating and/or mitigating circumstances including reasons for departure from the guidelines (if applicable).

Items a), b) and c) above are clearly important in order to identify main trends in current sentencing practice. Item d) is a basic measurement of the extent to which the guidelines are followed. Item e) is the main way to evaluate what is one of the most important effects of the implementation of the Commission's recommendations. Items f) and g) are important in understanding the sentences with respect to the guidelines, especially in the instances of offences which carry the "qualified in" and "qualified out" presumptions. Information about the criminal record and the seriousness of the offence, in these offences, determines the nature of the appropriate (presumptive) sanction. Item h) is central to understanding the reasons for variation within the guidelines and departures from them. In classifying items f), g) and h) as legal data, we do not want to imply that the permanent sentencing commission cannot derive meaningful statistics from their collection. We only want to indicate that these data need first to be extracted from written judgments and other sources in order to be later processed according to statistical methods.

Obviously, additional information would be helpful in trying to get a more complete understanding of the determinants of sentencing and to be able to identify issues or problems easily. However, the information that is listed above is quite adequate and, indeed, is more complete than Canada has and most countries have ever enjoyed, on a systematic nation-wide basis.

Having said that such information would be necessary to have on each case does not, however, mean that every offender in Canada must be sampled. Gathering information on all criminal cases would be ideal, but not strictly necessary for this purpose alone. Instead, it might well make sense to sample offences and court locations in order to get a comprehensive, but not exorbitantly expensive, picture of sentencing. Samples could be drawn on a regular and continuing basis with some variation in location of sampled courts across time. As pointed out earlier, such sampling seems to have been the rule rather than the exception in the early days of the sentencing commissions in the United States.

2.3 The Administration of a Sentencing Information System

This Commission has recommended that one of the responsibilities of the permanent sentencing commission be to collect relevant sentencing information in order to be able to carry out the various functions related to guidelines. It is recommended that the power to do this be vested explicitly in the permanent

sentencing commission. This is not to say that the commission would collect all data on its own, with its own resources. However, it must have the authority to collect such data.

Chapter 3 contained a brief description of the regrettable position in which we find ourselves in Canada with respect to sentencing data. There are a number of practical and political reasons why this has occurred which are not relevant here.

However, at this time, the Canadian Centre for Justice Statistics is working with the provinces to attempt to draw from the provinces' own computerized information systems the information that it had been collecting directly two decades ago. Although this does ensure that there is no unnecessary duplication of effort, it means that the Canadian Centre for Justice Statistics is dependent on the development in the provinces of a variety of different automated data systems. This is necessarily a slow process and even when a system is in place, it takes time for it to become operational in all parts of the province (e.g., especially in smaller or more remote communities). In any case, however, it is extremely unlikely that the Canadian Centre for Justice Statistics would be able to collect information other than the sentence attached to each offence of conviction. The additional information noted above (items f), g) and h)) would have to be collected in some other manner.

Due to the limitation of current systems, it is critical that the permanent sentencing commission have the authority to collect data in line with its own immediate needs. It is interesting to note that even though various state jurisdictions in the United States did not have a split jurisdiction to deal with, as we have here in Canada, they nevertheless found themselves very much in the same position as we are presently. As a consequence, some American state sentencing commissions were given the authority through legislation (*Hann, 1985; 9*) to collect sentencing data and as a result developed their own data-gathering capabilities (*Hann, 1985; 5*). The sentencing commission in Pennsylvania was given the power in its enabling legislation to get data from the relevant state agencies, publish these data (and analyses of them) and make recommendations to the legislature in areas related to data collection (*Hann, 1985; 6-8*).

There is, however, an additional reason for giving the permanent sentencing commission the authority to collect sentencing data on its own authority. The needs of the permanent sentencing commission are much more specific than those of other agencies. The data collection programs of other agencies are in a sense too broad and at the same time too narrow for the permanent sentencing commission's requirements. For instance, the court data collection program which is progressively being implemented by the Canadian Centre for Justice Statistics is comprehensive and it encompasses the gathering of information which is not immediately relevant for the permanent sentencing commission. This program will not, by its very nature, collect data on prison populations, which the permanent sentencing commission must obtain from other sources. Unless the permanent sentencing commission had its own

organizational and financial capabilities in the area of data-gathering and analysis, it would have no way of ensuring that it would be able to collect the data to fulfill its mandate.

Finally, no matter what legislative authority is given to any institution to collect sentencing data in Canada, the effort will not be successful unless co-operation is received not only from all provinces and territories, but also across the various levels of court in all jurisdictions. As the necessary providers of information are themselves spread across administrative groups (e.g., judges and court clerks are responsible to quite different authorities), a great deal of co-operation is necessary. One advantage of giving the permanent sentencing commission direct authority to collect sentencing data is that the relationship between the data being collected and the need for it will be very clear. With the purpose and need for the data being clear, it is likely that full co-operation would be easier to obtain.

If the permanent sentencing commission were given its own authority to carry out data collection, it could also monitor the data coming in to see quickly and in detail whether there were problems in interpreting the guidance from the commission. At the same time, of course, the commission could ensure that the data that were coming in were of sufficient quality to allow the commission to do its work.

For most of its purposes, the permanent sentencing commission would not need to have a considerable amount of data (such as those data noted above) on each case. Although it would be better to have these data collected on all cases, it is unlikely that this would happen in the foreseeable future. It would be sufficient for data to be collected on a sampling basis.

For other needs, however, the permanent sentencing commission would have to carry out *ad hoc* studies on special topics. An example of the kind of study that the commission might want to carry out would be to investigate differences in the use of certain dispositions. It might be that two jurisdictions differed markedly on their sentencing for a particular offence. This might turn out to be due to differences in the availability of certain programs, it could be because of differences in the nature of the particular offences coming before the courts, or it could signal the need for more explicit guidance from the commission itself. Special studies would probably be the most appropriate way of dealing with such questions.

2.4 Information for Decision-Makers

The permanent sentencing commission would also have the responsibility of collecting information relevant to the needs of judges in their decisions on sentencing. Such information could include details about current sentencing practice (including reasons for departures from guidelines), relevant information from Courts of Appeal, information about the availability of community sanctions, and outcome measures such as the probability of

successful completion of a community sanction for particular kinds of offenders.

An obvious advantage of having such information coming from the permanent sentencing commission is that the commission would consist not only of a majority of judges (who would have first-hand knowledge of the information needs of other judges) but would also come from the organization whose responsibility it was to improve the structure in which sentencing was occurring. Thus, the permanent sentencing commission would be seen as not only providing guidance to the sentencing judges but also would provide judges with the kind of information that a majority of judges in recent surveys have indicated that they would find helpful.

2.5 Setting Up an Information System: The Necessary Steps

One of the responsibilities that the Canadian Centre for Justice Statistics has had since its formation in 1981 was the creation of a system for collecting sentencing statistics. The process is not complete and it is difficult to know when it will be. In addition, all of the data necessary for carrying out the functions of the permanent sentencing commission will not be collected by this central system. Clearly, the permanent sentencing commission will have to collect some data on its own initiative. On the other hand, the permanent sentencing commission would be ill-advised to attempt to create its own permanent data-gathering structure that duplicates or is in competition with the work of the Canadian Centre for Justice Statistics.

14.2 The Commission recommends that the permanent sentencing commission be given the independent authority to collect the data necessary to carry out its mandate. This would include the authority, similar to that given to Statistics Canada, to enlist the co-operation of the provinces.

In order to do this, the permanent sentencing commission would be well advised to work closely with the Canadian Centre for Justice Statistics since it would maintain its primary role in the gathering of national statistics on sentencing.

14.3 The Commission recommends that the permanent sentencing commission rely, where necessary in the early years, on special *ad hoc* surveys of sentencing practice.

Such surveys may be conducted in the field of what we have described as legal data. Whether these surveys are carried out by the permanent sentencing commission itself, or are supervised by the staff and carried out by a private contractor, or are carried out in co-operation with the Canadian Centre for Justice Statistics is not important. What is important, is that such surveys be carried out under the control of the permanent sentencing commission. It is expected that the permanent sentencing commission's needs could be met in

this area with an annual budget of approximately three hundred thousand dollars.

In the long run, it would be expected that the permanent sentencing commission would be an important client of the Canadian Centre for Justice Statistics. At the moment, important governmental clients of the Canadian Centre for Justice Statistics sit on various councils and committees within the Canadian Centre for Justice Statistics to offer guidance and advice. It is not recommended that the permanent sentencing commission have any such formal relationship with the Canadian Centre for Justice Statistics at the outset. The permanent sentencing commission might well wish to monitor this situation over the years to see if a more formal link would be useful.

Because of its need for an independent capability in the area of sentencing data:

14.4 The Commission recommends that a budget sufficient for collecting the sentencing data necessary to carry out its responsibilities be allocated to the permanent sentencing commission.

In the long term, it is possible that the permanent sentencing commission would find it in its interest to purchase such services from the Canadian Centre for Justice Statistics.

Finally, it is likely that the permanent sentencing commission would always need to have some data collection of its own. Thus, in addition to the budget to get basic sentencing information, the permanent sentencing commission would have to be given an additional research capability (in the form of a budget). It is expected that this could be carried out, on a continuing basis, within the suggested annual operating costs of \$800,000 mentioned earlier in section 1.2.6.

3. Impact of the Recommendations on Provincial Institutions

Information systems are not the only connection between the Commission's proposals and matters which are under provincial jurisdiction. The Commission's recommendations involving more restraint in the use of incarceration should result, among other things, in shorter terms of incarceration. As it is well known, offenders receiving custodial sentences of less than two years serve their term in a provincial prison; if the sentence is two years or more, it is served in a federal penitentiary. A reduction in the length of custodial sentences may bring about a shift in prisoner populations from federal to provincial institutions. Should this occur, it is possible that the resulting pressure on the provincial correctional system will be offset by the impact of other recommendations made by the Commission including:

- a) The recommendations concerning payment of fines will drastically reduce imprisonment for defaulting on a fine, which is a burden on the provincial system.

- b) The elimination of all minimum penalties, except for murder and high treason, will also reduce the volume of incarceration in provincial institutions.
- c) The guidelines recommended by the Commission will also contribute very significantly to reduce the pressure on provincial custodial institutions. For example, thousands of cases involving numerous offences under the *Criminal Code* and related statutes (e.g., obstructing justice - ss. 133(3), failure to appear – ss. 133(4) & (5), dangerous driving – ss. 234 & 234(1), failure to comply to probation order – s. 666, and possession of narcotics – s. 3, *Narcotic Control Act*) presently result in sentences which are served in provincial jails. Under the Commission's proposal all these offences are assigned a qualified or an unqualified presumption of non-custody.
- d) The Commission's emphasis on the necessity of increasing the use of community sanctions should also result in reducing the size of provincial prison populations. It is recognized, however, that the responsibility for the establishment and operation of community-based programs fall to the provinces.

The impact of the Commission's recommendations on the size of prison populations will have to be closely monitored by the permanent sentencing commission. If, despite all the measures which we have just listed above, the size of provincial prison populations should significantly increase because of a reduction in the length of custodial sentences, the two-year line dividing provincial and federal incarceration could be set at a lower point. This measure would cause a shift of a proportion of the provincial jail population to the federal system. We have seen in the historical chapter that the dividing line of two years was determined rather arbitrarily. We might mention that a lower dividing threshold between sentences served in federal and provincial institutions might well be more consistent with the Commission's proposed categorization of offences and maximum penalties.

There is one further point on which the Commission's recommendations involve matters of provincial jurisdiction. This is the issue of introducing more visibility and more accountability into the plea-negotiation process. It would be desirable that the provinces co-operate in the formulation of common standards for plea-negotiations in order to ensure that the highest degree equality and equity prevail across the country.

4. Implementation and Operational Costs

The terms of reference do not require the Commission to examine or analyze the cost implications of its proposals. However, given the importance of this exercise and the realization by the members of the Commission that change cannot be effected without cost, it was felt advisable to comment briefly on the nature of the costs and cost-sharing of the proposals. The following comments are offered regarding implementation and operational costs.

4.1 Implementation Costs

A number of the Commission's proposals will entail costs in the nature of capital "start-up" costs. Most of these implementation costs will result in ultimate decreases in the operational costs. For example, the Commission has recommended a greater use of "open custody" sanctions. This necessarily implies that in those jurisdictions where no open custody facilities exist (e.g., work camps, community training residences, etc.) that such facilities and programs should be instituted. In the long-run however, according to our proposals, an increased use of open custody facilities must result in a decrease in the demand for the more expensive, secure custody facilities.

With the effective exercise of restraint in the use of incarceration will come a consequential need for programs to support the increased use of community sanctions. This will call for additional and new programs.

The establishment of a national information system also clearly has cost implications for both the federal government and the provinces. If, for example, sentencing data requirements are to be met in each province across the country, costs will be greatest to those provinces currently using the least sophisticated data collection methods.

A final example of implementation costs are those costs involved in the training, education, and orientation or re-orientation of all persons central to the operation of the criminal justice system. Included in these numbers would be judges, lawyers, police officers, probation and parole officers, court workers, other professionals and volunteers working in the criminal justice system. While the Commission has not specifically discussed the need for adequate educational programs to assist in resolving problems of disparity and inequity in sentencing, it does nevertheless recognize the crucial importance of such programs; not only for the ongoing improvement of the sentencing process generally, but for the smooth and effective implementation of reform measures. In addition, there is a need for public education programs to inform members of the public of the changes to the sentencing process.

4.2 Operational Costs

The package of sentencing reform proposed by the Commission would, if implemented, not require any overall increase in operational costs. If the proposals in their entirety are adopted, there should be a resulting overall shift from more costly carceral sanctions to new community programs. It is expected that as a result of the guidelines proposed by the Commission, this shift will occur without causing a widening-of-the-net effect. The creation of a permanent sentencing commission will necessarily involve operational costs, but again, these costs should not result in a net increase in operating costs, given the nature of savings that will result from restraint in the use of imprisonment as a sanction. The abolition of full parole and the reduction of

mandatory supervision are other operating costs that will ultimately be substantially reduced.

4.3 Conclusion

The implementation of the Commission's recommendations will certainly result in the realignment of the costs of administering criminal justice programs particularly with regard to incarceration and community sanctions. It is expected that a significant portion of these costs will shift to the provinces thereby increasing their financial responsibility. While there will also be increased costs for the federal government (e.g., the establishment and operation of the permanent sentencing commission) there should as well be corresponding significant savings (e.g., restraint in the use of incarceration, elimination of parole and reduction of mandatory supervision). Accordingly, the Commission urges the federal government to assist the provinces with both initial start-up costs and ongoing operational costs. While it is not the role of the Commission to suggest specific funding programs, it recognizes the responsibility of the federal government to assist provinces in the implementation of national policy and principles. The establishment of criminal law policy goes beyond merely passing legislation and leaving its implementation to the provinces.

The Neilson Task Force Report has stressed the importance of the criminal justice system as a joint responsibility that accordingly requires that costs be shared by federal and provincial jurisdictions. The implementation of the *Young Offenders Act* is an example of how the federal government has accepted the responsibility of cost-sharing in the area of criminal justice reform. The Task Force summarizes the importance of this function as follows:

Finally, based on the foregoing relationships with the provinces in this sector of shared jurisdictions, the study team believes emphasis should be placed on a more co-operative, fact-based footing. Services, wherever possible, could be shared, and every effort made to develop new criminal law on a co-operative basis, tying consultation to criteria such as jointly developed costing data and providing for the joint development of demonstration projects. (pp.21-22)

The Commission has only highlighted some of the cost implications of its proposals. The Commission is of the view that if the government were to implement this proposed integrated set of reforms, that there should not be any increase in overall long-term criminal justice spending. As we have pointed out, there will, however, be start-up and implementation costs. Hence, it is important that as the federal and provincial governments share jurisdiction in the implementation of criminal justice reforms that they also share the responsibility for and the costs of such reforms. In conclusion, the Commission is hopeful that the principle of shared responsibility in the implementation of criminal justice reforms will continue to be the guiding policy.

5. An Agenda for Change: Some Considerations

It is not within the power of a Commission of Inquiry to proceed to the implementation of its own recommendations. Without going into the provision of a detailed timetable for the eventual implementation of its proposal, if adopted, the Commission would like nonetheless to make a number of points and suggestions with respect to the implementation of its recommendations. The most crucial requirement is that no legislative modification of the maximum penalties and of the provisions relating to parole and remission be implemented before all presumptive guideline ranges are finalized by the permanent sentencing commission. Other considerations follow:

a) Creation of a Permanent Sentencing Commission

One of the first steps will be the enactment of legislation necessary to authorize the establishment of the permanent sentencing commission and to give it the legal powers which it needs to develop adequate sentencing information systems.

b) Finalization of Sentencing Range Guidelines

The initial task of the permanent sentencing commission will be to finalize the sentencing range guidelines in conformity with the recommendations and the prototypes developed by this Commission. Custodial ranges should be determined for all offences for which there is a presumption involving the potential use of incarceration (“in”, “qualified in”, and “qualified out”). The permanent sentencing commission may have to consult with other bodies involved in criminal law review in order to finalize the numerical ranges. The permanent sentencing commission should also coordinate its operations with the Canadian Centre for Justice Statistics and other relevant bodies in order to implement in the most efficient way its sentencing information systems.

c) Consultation

It is expected that in formulating the sentencing range guidelines and the implementation of adequate sentencing information systems, the permanent sentencing commission will consult with relevant federal and provincial departments and agencies as well as with professional and other parties interested in the criminal justice system. Meanwhile, we anticipate that the Minister of Justice will have initiated consultations on the Commission’s recommendations shortly after publication of the report.

d) Approval of Guidelines by the House of Commons

This procedure has been described in detail in Chapter 11. As we have previously stressed, the adoption of the sentencing guidelines should proceed with a view to their concurrent

implementation with the other legislative changes resulting from the Commission's proposals.

6. List of Recommendations

- 14.1 The Commission recommends that the *Criminal Code* be amended to provide for the establishment and maintenance of a permanent sentencing commission.
- 14.2 The Commission recommends that the permanent sentencing commission be given the independent authority to collect the data necessary to carry out its mandate. This would include the authority, similar to that given to Statistics Canada, to enlist the co-operation of the provinces.
- 14.3 The Commission recommends that the permanent sentencing commission rely, where necessary in the early years, on special *ad hoc* surveys of sentencing practice.
- 14.4 The Commission recommends that a budget sufficient for collecting the sentencing data necessary to carry out its responsibilities be allocated to the permanent sentencing commission.

Endnotes

- ¹. States with sentencing commissions include: Florida, Maine, Minnesota, Pennsylvania, South Carolina and the State of Washington.
- ². *The Judges Act*, R.S.C. 1970, c. 159.

Chapter 15

Conclusion

A conclusion is usually devoted to summarizing the main points which have been made in a book or a report. Here such a conclusion would be redundant because a summary has already been provided at the beginning. In the general introduction to the second part of this report, the Commission stated what it intended to achieve in formulating its recommendations. In this conclusion, we shall reflect briefly upon the main features of the integrated set of reforms proposed by this Commission.

One of the conclusions to emerge from the Commission's research program is that the current system is more complex than efficient. The growth in costs and complexity of the criminal justice system has not been matched by a corresponding increase in benefits to society. It might even be argued that the inordinate complexity of the system is too high a price to pay for the meagre results now achieved by that system. For example, despite the stated objective of the current system to individualize sentences and the corresponding multiplication of rules and programs to facilitate such individualization, in reality the sentencing process still operates according to the principles of a very plain logic by which all sanctions are defined in terms of incarceration or alternatives thereto.

The criminal justice system generates its own needs and devotes a significant part of its energy to fulfilling these artificially-created needs rather than meeting the demands of the community. Thus, early release has been used in a number of jurisdictions more as a tool to ease the pressure created by the increase in prison populations than as an instrument to protect the public and rehabilitate the offender. Actually, not only does the complexity of the sentencing process make it remote from the general public's understanding, but it also screens the strengths and weaknesses of the process, thereby obstructing attempts at precise evaluation.

In accordance with this assessment, the Commission has undertaken to simplify the sentencing process and to make recommendations that would bridge the gap between the letter and intent of the law on the one hand and its actual application on the other. In performing this task the Commission was led to draw an important distinction between two different kinds of complexity.

The first may be described as the unintended result of the piecemeal approach that was previously taken in amending sentencing law and practice. Incremental measures were added one to the other without any apparent attempt to see how they fitted together in a consistent pattern. The maze of rules governing early release is a prime example of the kind of complexity which needlessly undermines the sentencing process. Another example is the use of concurrent and consecutive sentences. These unnecessary complications can be simplified in a way that will improve the sentencing process.

There is however another sort of complexity built into the sentencing process which is an essential and permanent aspect of its operation. The imposition of sanctions upon members of society is a difficult decision which involves the consideration of many factors. Dealing with human behaviour is an extremely complex exercise and accordingly, in striving to make sentencing more understandable and predictable, one must be careful not to over-simplify the decision-making process. In recommending presumptive guidelines, the Commission was wary of limiting the choice to either "in" or "out" and hence recommends four levels of presumptive dispositions. The Commission is firmly convinced that, despite its obvious desirability, simplification of the operation of the sentencing process should not be accomplished at the expense of the principles of fundamental justice. Issues such as the decision to incarcerate an offender, the enhancement of custodial sentences and sentencing for multiple convictions cannot be over-simplified. They have been the subject of careful and in-depth deliberation and the Commission's recommendations on these matters and others should be assessed with as much care as was given to their formulation.

It has often been stressed in this report that the Commission's recommendations form an integrated whole designed to achieve a balance between unfettered discretion and a model of mandatory sentences. While achieving a proper balance is admittedly a difficult and delicate task, in this endeavour the Commission was anxious to avoid either extreme, and especially so with regard to sentencing guidelines. One option would have been to steer away from its terms of reference and to relinquish entirely to the Courts of Appeal the development of sentencing policy and guidance. This option would have amounted to little more than continuing the *status quo*, ignoring the problems which the Commission found to be associated with the current state of sentencing. Indeed, this Commission would never have been appointed nor allowed to spend public funds if the present state of affairs had been thought to be, in the main, satisfactory. A more extreme option would have been to depart abruptly from Canadian judicial tradition and propose a model of sentencing guidelines (such as a grid or a mathematical equation), which relied heavily on the computation of numerical scores and offered little flexibility.

Instead of recommending that no real change take place or proposing reforms which would have been foreign to our judicial tradition, the Commission has developed recommendations that constitute a middle ground. Middle-range solutions are by their very nature vulnerable to criticism from two sides. They can be said to provide either too much guidance or not enough.

In favouring the middle ground, the Commission made a choice that was very deliberate. This option was chosen because of its reasonableness and also because it was in line with this country's tradition of solving problems. An attempt to change the focus of the Commission's recommendations – either by bringing them closer to the *status quo* or nearer to the more radical options which were explicitly rejected – would upset that balance between judicial and democratic institutions deemed essential by this Commission.

Two obvious questions come to mind when assessing the meaning of this integrated set of recommendations. First, in recommending that maximum penalties be decreased, is the Commission not thereby proposing the adoption of a more lenient attitude towards crime? Second, in recommending presumptive sentencing guidelines, is it not thereby taking sentencing decisions away from the judiciary? These two questions are so closely connected that they may be addressed by a common answer.

Although the Commission recommends that maximum penalties be decreased, the proposed maxima are still much higher than the average sentences imposed under current practice. Furthermore, the Commission recommends that any offender receiving a sentence of imprisonment must spend at least 75% of his or her sentence in custody. If sentences were to remain at their current level, this last recommendation would have the consequence of significantly increasing prison populations within a short period of time. Hence, what is at risk here is not undue restraint but more severity in the imposition of sanctions. In order to offset an increase in the overall severity of sanctions, the Commission proposes several different measures, including: a sentencing rationale which gives priority to the principles of proportionality and restraint; sentencing guidelines; an increase in the use of community sanctions and a substantial reduction in the use of incarceration for fine defaulters. The power to apply or to resist these measures rests entirely where it has always been and where it should continue to lie: in the hands of the judiciary. No element of these recommendations compels a judge to determine a sentence by any method or principle other than what the judge perceives to be just. The judges are provided with presumptive guidelines which were carefully designed to fit the standard cases and which will be regularly updated. A judge retains full discretion to assess whether a given case is uncommon enough to warrant a departure from the guidelines. If the trial judge reaches such a conclusion, he or she must state explicitly the reasons which support it. Once the trial judge has complied with this requirement, the only remaining consequence is that the decision and supporting reasons may be reviewed on appeal. This is entirely consistent with present judicial tradition.

Throughout its deliberations and in the formulation of its recommendations, the Commission was constantly concerned that its proposals be realistic and feasible. This report has already noted that since the Ouimet Committee reported in 1969, there have been many calls for the requirement that judges provide written reasons for all sentences of imprisonment. This recommendation has yet to be implemented. According to an August, 1986 report issued by the Solicitor General of the Province of Quebec, 18,347 offenders were

sentenced to a provincial term of incarceration in Quebec, during the fiscal year of 1985-86 (*Rapport du Comité d'étude sur les solutions de rechange à l'incarcération* p. 57). This figure (which refers to incarceration in provincial institutions in the province of Quebec) is indicative of the very high number of custodial sentences imposed every year in the whole of Canada. Even granting that the requirement to justify sentences of custody may reduce significantly the use of incarceration, courts will either be compelled to provide very short and perfunctory justifications or they will be faced with dispatching an overwhelming caseload. For all its merits, it may be that the requirement to justify all sentences of incarceration has never been implemented because of problems of feasibility. The Commission's recommendation to issue general guidelines on the use of incarceration and to require explicit reasons only in the case of departures from the guidelines is much more realistic than the obligation to provide reasons for all individual custodial sentences.

There is one more significant advantage to the Commission's recommendations. Any requirement that judges justify in writing all sentences of incarceration rests at least in part on the implicit assumption that injustice usually occurs when a custodial sentence disproportionate to the offence of conviction is imposed on an offender. However, injustice can also result if custody is not imposed when it would be entirely warranted by the seriousness of the offence and the degree of responsibility of the offender. Under the Commission's proposals, a judge who would depart from a presumption of imprisonment (an "in" or a "qualified in") would no less have to justify his/her decision than a judge imposing a custodial sentence which does not comply with the guidelines. Even though the Commission strongly advocates restraint in the use of incarceration, its recommended guidelines nonetheless, have no built-in bias favouring undue leniency.

The Commission has devoted careful attention to articulating a reform of sentencing which is feasible and can be implemented without unduly taxing government resources. The view that Commission reports are more successful in enriching libraries than changing the system is frequently expressed. While the Commission cannot determine the fate of its recommendations, it can at least state explicitly that its report was not written in the spirit of enhancing the level of sentencing scholarship, but rather with a view to reforming the sentencing process in a realistic manner. In striving to provide the basis for a common approach to sentencing, the Commission has recommended guidelines to provide the necessary structure and guidance for the exercise of discretion throughout the process. More visibility and accountability in the process are an inevitable and important aspect of these recommendations. In the final analysis, if these reforms serve to enhance public understanding of and confidence in the process, the Commission will have accomplished an important aim in the on-going need for evaluation and reform of sentencing in Canada.

Appendices

Appendices

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Appendix A

The Commission's Research Plan

The background of members of the research staff reflected a diversity of approaches to sentencing. A multi-disciplinary approach was employed to address the wide-ranging issues raised by the Commission's mandate.

The research workplan was designed to provide the Commission with both a clear delineation of the issues and possible approaches to their solution. Once the major areas requiring analysis were identified, four major functions were assigned to the staff: first, to conduct research in-house; second, to define and oversee research to be conducted for the Commission; third, to collect information from existing government sources on a variety of issues to minimize the risk of duplication of effort; and finally, to prepare meeting books, background papers and options papers for presentation at each Commission meeting. A time-frame was constructed, outlining all projects to be undertaken in the course of the two and a half year mandate. With minor variations and additions, the progress of the Commission's research workplan followed the time-frame as initially set. Over the course of its mandate, the Commissioners met approximately every four to six weeks for a total of 22 meetings.

A number of issues were dealt with exclusively in-house: sentencing theory and policy, consecutive and concurrent sentences, comparative legislated maximum penalties, mandatory minima, offence ranking, the development of questionnaires for judges, lawyers and criminal justice professionals, and surveys of public perceptions. Given the time-consuming nature of conducting empirical research, a number of papers were contracted out to consultants. This also ensured that time and energy would remain to conduct the difficult tasks of providing the Commission with thoughtful options on how the issues addressed in these papers might be approached.

The research staff expended considerable energy and resources gathering and cross-checking statistics upon current sentencing practice. The difficulties involved in obtaining reliable data are discussed in Chapter 3. Prior to the establishment of this Commission, the most recent statistics on sentencing practice were contained in a series of reports published by the federal

Department of Justice (see Hann *et al*; 1983). One of the tasks remaining was to compile, in co-operation with the Department of Justice, more recent sentencing data (see Hann and Kopelman, 1986). In addition, data were derived from the fingerprint records maintained by the Royal Canadian Mounted Police (FPS-CPIC). These statistical data were systematically compared and discrepancies were resolved by additional research. The Commission drew most heavily upon these three sources of information, but others were employed as well. The Ministry of the Solicitor General provided information upon specific requests made by the Commission research staff. In addition, provincial government agencies (e.g., Ministry of Correctional Services, Ontario and the Ministère du Solliciteur Général du Québec) were also very helpful in providing information about provincial institutions.

The reports written for the Commission are listed in the Bibliography, but given their importance to our work, they are described more fully below.

Reports Prepared For The Commission

This list includes some reports written in-house in order to present a fuller picture of the research workplan.

1. Literature Review

- | | |
|--------------------------------|--|
| 1.1 Bibliography | general bibliography on sentencing undertaken by research staff |
| 1.2 Canadian Literature Review | <p>"Sentencing Research in Canada: A Review of the Literature, 1969-1984", Julian V. Roberts, January, 1985</p> <p>- a comprehensive review and summary of recent research on sentencing</p> |
| 1.3 Disparity Review | <p>"Inventaire d'extraits significatifs ayant trait à la disparité des sentences dans la littérature canadienne", Alvaro P. Pires, 1984</p> <p>- an assessment of the literature and Canadian government documents with respect to the existence of real or perceived disparity in Canada</p> |
| 1.4 Catalog on Incarceration | <p>"Critiques à la prison et principe de modération: inventaire d'extraits dans les documents canadiens", Alvaro P. Pires, August, 1985.</p> <p>- a catalog of excerpts from Canadian official documents and literature on the need for restraint in the use of incarceration</p> |

- 1.5 Historical Study
- “Sentencing Structure in Canada; Historical Perspectives ”**, Martin L. Friedland, October, 1985
- a history of sentencing in Canada with a focus on the legislative history of maximum penalties and the use of imprisonment in Canada
- 1.6 Review of Non-Custodial Sanctions
- “A Profile of Canadian Alternative Sentencing Programmes: A National Review of Policy Issues”**, John W. Ekstedt and Margaret A. Jackson, February, 1986
- an extensive review of Canadian literature evaluating the success of community sanctions and alternatives ways of serving a sentence of imprisonment
- 1.7 Guidelines in the U.S.
- “Issues Relating to Guideline Implementation and Evaluation in the U.S. and their Relevance to Canadian Sentencing Reform”**, Aidan Vining, March, 1985
- an analysis of the methods and impacts of sentencing guidelines commissions in a number of U.S. jurisdictions
- 1.8 Parole/Mandatory Supervision Review
- “Parole and Remission: A Review of Issues and Trends”**, A Working Paper of the Correctional Law Review, Ministry of the Solicitor General of Canada, Lee Axon, March, 1985
- a study shared with the Correctional Law Review reviewing the literature on parole and mandatory supervision in Canada and the U.S.

2. Legal Research

2.1 Breakdown of Offences

a categorization of all offences in the *Criminal Code*, *Narcotic Control Act*, and *Food and Drugs Act* (Parts III, IV) by maximum and minimum penalties to compare with actual sentencing practice (i.e. corresponding ranges from Court of Appeal judgments according to Nadin-Davis, and existing sentencing data).

- 2.2 Revised Index of Offences a list of all offences in the relevant statutes (listed above) reflecting the amendments pursuant to the *Criminal Law Amendment Act, 1985*
- 2.3 Comparative Penalty Charts comparative penalty charts listing maximum penalties for comparable offences for a number of jurisdictions, undertaken by research staff
- 2.4 Appeal Courts
- “The Role of Appeal Courts in Establishing Sentencing Ranges”**, Alan Young, December, 1984
- an examination of judgments of selected Courts of Appeal regarding their role in establishing sentencing ranges in “guideline judgments”
- “The Operation of Appellate Sentencing Ranges in Trial Court Sentencing Decisions”**, Alan Young, December, 1984
- an examination of trial court judgments for citations of Court of Appeal “guidelines” or policy decisions
- “The Operation of Mitigating and Aggravating Factors in Appellate Sentencing Decisions”**, Alan Young, April, 1985
- an examination of judgments of selected Appeal Courts regarding the development of guidelines to assist sentencing judges in their analysis of aggravating and mitigating factors
- “Tariff Sentencing in Canada”**, Alan Young, August, 1985
- an examination of the impact of tariff sentencing in Canada on reducing disparity or contributing to a greater rationality in sentencing
- “The In-out Decision and the Impact of the Criminal Record”**, Alan Young, November, 1985
- a review of appellate jurisprudence on principles relating to the appropriate use of imprisonment and of the prior criminal record in sentencing

“An Empirical Study of the Use of Mitigating and Aggravating Factors in Sentence Appeals in Alberta and Québec from 1980 to 1985”, Shereen

Benzvy Miller, February, 1986

- a review of appellate jurisprudence to derive a list of the most frequently-cited aggravating and mitigating factors and the context in which they are used

“Concurrent and Consecutive Sentences”, (Staff)

- a review of appellate jurisprudence on the use of concurrent and consecutive sentences.

2.5 Plea Bargaining

“Plea Bargaining and Sentencing Guidelines”, Simon Verdun-Jones and

Alison J. Hatch, March 1985

- an assessment of the literature and an analysis of reported judgments respecting plea bargaining and prosecutorial discretion in Canada

2.6 Fines

“The Fine as a Sentencing Option in Canada”, Simon Verdun-Jones, Teresa

Mitchell-Banks, April, 1986

- a review of fines as a sentencing option in Canada and an examination of how the issue of fines might be approached in the context of guidelines

2.7 Permanent Sentencing Commission

An examination of the feasibility of establishing a permanent sentencing commission and the corresponding legal and administrative implications, Martin L. Freidland, Hudson Janish, November, 1985

a legal opinion on the status of sentencing guidelines and a permanent sentencing commission in Canada, Roger Tassé, July, 1986.

3. Empirical Research

3.1 Survey of Judges

“Opinion of Sentencing Judges in Canada: A Report”, Research Staff,

November, 1985

- a survey of Canadian judges involved in criminal sentencing on a number of

topics including: sentencing goals; sentencing resources; plea-bargaining; the administration of sentences of imprisonment; and the effectiveness of appellate review (staff)

some follow-up interviews were also conducted

3.2 Survey of Defence and Crown Counsel

“Crown and Defence Counsel Questionnaire”, Staff; Landau, T., March 1986

- a survey of Canadian Crown and defence counsel on a number of topics including: sentencing goals; sentencing resources; plea bargaining; the administration of sentences of imprisonment; and the effectiveness of appellate review

3.3 Survey of Probation and Parole: Officers

“La détermination de la peine: les professionnels et praticiens non-juristes s’expriment”, Samir Rizkalla, Sylvie Bellot, Anne Morrisette, March 1986
-a survey of the opinions of probation and parole officers in Quebec on issues relating to the terms of reference.

“Probation and Parole Officers Survey”. Jim Richardson, June, 1986.
- a survey of the opinions of probation and parole officers in the Atlantic provinces on issues relating to the terms of reference

3.4 Survey of Inmates

“Points de vue de détenu-e-s du Québec sur quelques questions soulevées par le mandat de la Commission canadienne sur la détermination de la peine”, Pierre Landreville, July, 1985
- Since the Commission was unlikely to hear from a broad section of the inmate population through public submissions, a survey was undertaken to canvass the view of inmates on a number of important issues relevant to the mandate. This qualitative survey was undertaken in the province of Quebec.

“Justice in Sentencing: Offender Perceptions”, John Ekstedt, September, 1985

- a survey of inmate views of sentencing undertaken in the province of British Columbia.

“Native Offender Project”, Brad Morse, Linda Lock, November, 1985

- a separate survey of native inmates was also conducted in several provinces.

3.5 Survey of Public Views

Nationwide survey of public views on issues such as public understanding of parole and mandatory supervision and public perceptions regarding the relative seriousness of offences (Staff; Gallup)

Opinion surveys of selected groups to test the Commission’s offence-ranking with other groups perceptions of the seriousness of offences (Staff)

A second nationwide survey of public estimates of imprisonment rates and maximum penalties (Staff; Gallup)

A third representative survey of public views on knowledge of mandatory minima and the sentencing process in general (Staff, Gallup)

3.6 Survey of the Media

“Process, Policy and Prejudice – A Survey of Editorial Policies on Sentencing Related News”, Erika Rosenfeld, April, 1986

- a survey of newspaper, radio and television, newsmagazine editors and writers regarding existing policies with regard to coverage of sentencing issues, (Ontario)

“Recherche sur les stratégies et pratiques des médias en matière d’information judiciaire,” Gaetan Tremblay, March, 1986

- a similar survey was conducted in the province of Quebec

“Sentencing in the Media: A Content Analysis of Canadian Newspapers

- (English Language)", (Staff)
- a content analysis of newspaper coverage of sentencing issues.
- 3.7 Community Programs
- "Alternatives to Incarceration/Sentencing Option Programmes: What are the Alternatives?"** John Ekstedt and Margaret A. Jackson, April, 1986
- empirical research on selected programs (e.g., community service orders, intermittent sentences) which have been identified as successful
- 3.8 Sentencing Trends in Canada
- "Custodial and Probation Sentences Project: Overview Report and Individual Offence Reports"**, Robert G. Hann and Faigie Kopelman, May, 1986
- a study of the most recent trends in sentencing which was prepared jointly for the Department of Justice and the Canadian Sentencing Commission
- 3.9 Judicial Resources
- "Sentencing Inventory"**, Melody Hainsworth, March, 1985
- an inventory of sentencing resources in selected provinces, including circulation and publication of Appeal Court judgments, availability of continuing education seminars, sentencing material in court libraries, etc.
- 3.10 Information Systems
- "Information Systems for Sentencing Guidelines: Recent Experience"** Robert G. Hann (The Research Group), March, 1985
- a study of already implemented information systems in select U.S. jurisdictions
- "Information Systems to Support a Canadian Sentencing Commission: Initial Comments"** (Draft #1), William G. Harman and Robert G. Hann (The Research Group), March, 1986
- a follow-up study to the report on information systems necessary to support a permanent sentencing commission in Canada
- 3.11 Impact Study
- "Simulation of Federal Penitentiary Populations: A Methodology** (Draft

#1)", William G. Harman, Robert G. Hann, March, 1986

- a methodology for the simulation of federal penitentiary populations including a preliminary study on the effect of the Commission's recommendations and an analysis of the feasibility of assessing the future impact of a proposed guidelines model

4. Position Papers

4.1 Terms of Reference

"The Canadian Sentencing Commission: Issues and Methods", Jean-Paul Brodeur, August, 1984.

- a discussion of the issues raised by the Commission's terms of reference and proposals for developing an approach to their solution (translated by the author under the title of **"Commission Canadienne sur la détermination de la peine: Questions et Méthodes"**).

4.2 Victims

"The Role of the Victim in Sentencing and Related Processes," Irvin Waller, January, 1986

- an opinion paper on the role of the victim in the sentencing process

4.3 Deterrence

"Legal Sanctions and Deterrence", F.D. Cousineau, March, 1986

- an opinion paper examining the effectiveness of deterrence as a goal of sentencing,

Acknowledgements

There are a number of government departments, organizations and individuals who provided the Commission with data, studies, reports and perhaps most important, food for thought.

The Department of Justice, Canadian Centre for Justice Statistics and the Ministry of the Solicitor General were co-operative throughout the course of the mandate in providing research reports and access to data.

The Commission also benefitted from consultations with the Law Reform Commission of Canada, John Howard Society (Canada, Alberta and Ontario), Elizabeth Fry Society (Canada), National Parole Board, Correctional Law Review (Ministry of the Solicitor General), Ontario District Court Judges, The National Joint Committee of the Canadian Association of Chiefs of Police and Federal Correctional Services, the Ontario Criminal Lawyers Association, and the Church Council on Justice and Corrections. A large number of provincial

court judges also gave generously of their time through meetings held with The Canadian Association of Provincial Court Judges and several provincial court judges associations.

In the first year of its mandate, the Commission consulted with a number of Canadians who had made major contributions in the past to the study of sentencing. Professors Duncan Chappell, John Hogarth, Keith Jobson and Aidan Vining were most helpful in providing feedback to the Commission's research plans. As well, the Commission benefitted greatly from the major Canadian treatises on sentencing by John Hogarth, Paul Nadin-Davis and Clayton Ruby and from the collection of papers published by Brian Grosman. At the end of its term, the Commission benefitted from the advice of Professor Alan Manson on the more technical aspects of early release. Jack MacDonald, previously with the Sentencing Project at the Department of Justice, was generous with his time and provided us with some valuable insights.

The work of the Commission also benefitted greatly from the advice of prominent people in the field of sentencing in Great Britain and the United States. Professor D.A. Thomas provided the Commission with insight as to the tide of sentencing reform in Great Britain. The Commission also consulted Professors Andrew von Hirsch and Albert Reiss on a number of occasions and benefitted greatly from their knowledge of sentencing reform in the United States and their most helpful insights regarding the development of a sentencing policy for Canada. Professor von Hirsch was particularly helpful in providing the Commission with specific proposals as well as with material on the recent sentencing reforms proposed in Sweden where he had previously worked as a consultant.

Interviews were also held with the research directors of three U.S. state sentencing guidelines commissions in order to allow this Commission to learn from the recent experience in these jurisdictions. The Commission primarily sought to learn more about the kinds of information systems existing or developed in these states. Since much of this type of information is not readily accessible in written form, the Commission relied on the patient co-operation of those people with first-hand knowledge of the often complex sentencing information and data collection systems. Kay Knapp (Research Director, Minnesota Sentencing Guidelines Commission), David Fallen (Research Director, Washington Sentencing Guidelines Commission), John Kramer (Executive Director, Pennsylvania Commission on Sentencing) and the staff of these commissions, were most helpful in explaining their information structures to us.

Commissioners and research staff were invited to speak at conferences across the country on a number of occasions. One particularly helpful meeting was a consultation held in Whitehorse with a number of community and professional individuals and groups from the Yukon. These occasions were

most illuminating as they revealed early on that perceptions of disparity in sentencing vary greatly from St. John's to Victoria. As well, the Chairman and Director of Research were invited to attend two international conferences (International Criminal Law Congress in Adelaide, Australia, October, 1985; Conference on Sentencing Disparity and Consistency in Oxford, England, April, 1986).

Appendix B

Submissions Made to the Canadian Sentencing Commission

Individuals

| | |
|------------------------|---|
| Alarie, Denis | Lewis, Diane F. |
| Anderson, Robert J. | Lingley, Bob |
| Antonow, E. | Lister, Philip |
| Batchelor, Dahn | MacDonald, Chris |
| Bauche, Daniel | Matthews, Mrs. Charlotte |
| Bennett, Michael | McIntyre, Brian E. |
| Booth, Gordon | McNab, Gordon F. |
| Couvrette, L. | McQueen, A.T. |
| Dennison, I. | Mohr, Johann W. |
| Dion, Pierre | Morissette, Sylvain |
| Ellerton, Angelique L. | Paris, Walter |
| Enright, R.L. | Petronio, A.A. |
| Farrell, Norman | Raineville, Rejeanne |
| Ford, Mrs. James A. | Ray, Dr. A.K. |
| Garand, Ms. Louise | Rigo, Alfred |
| Gillissie, Rev. A.W.J. | Robitaille, Robert |
| Honey, Larry P. | Schneider, Howard |
| Houle, Sylvio | Smith, William Neil |
| Irwin, Ross W. | Stephen, Douglas |
| Jobson, Keith B. | Struthers, Wallace |
| Lee, Robert | Teed, Eric, L. |
| Lewsey, Alfred A. | TosczaK, Jan; Kaill, Helen and Sweet, Elaine |

National Groups

Canadian Association of Chiefs of Police
Canadian Association of Elizabeth Fry Societies
Canadian Association of Paroling Authorities
Canadian Bar Association
Canadian Crime Victims Advocates
The Canadian Criminal Justice Association
Canadian Federation of Humane Societies
The Church Council on Justice and Corrections
Citizens' Advisory Committee to the Correctional Service of Canada
The John Howard Society of Canada
Law Reform Commission of Canada
The National Parole Board
Quaker Committee on Jails and Justice
St. Leonard's Society of Canada
Victims of Violence Inc., Victims Rights Advocates

Provincial Groups

Advisory Council on the Status of Women (New Brunswick)
Alberta Seventh Step Society
Alberta Status of Women Action Committee
Attorney General of Alberta
Canadian Bar Association (Yukon Branch)
Citizens for Public Justice
Crees of Québec
Criminal Lawyers' Association of Ontario
Government of Northwest Territories
John Howard Society of Alberta
John Howard Society of Ontario
Legal Aid Manitoba
Native Counselling Services of Alberta
New Brunswick Chapter of the Canadian Criminal Justice Association
Northwest Territories Defence Lawyers' Association
Ontario Women's Directorate
Plaidoyers-Victimes
Sexual Abuse Victims Anonymous (British Columbia)
Société de Criminologie du Québec
Solicitor General of Alberta

Local Groups

The Catholic Diocese of Victoria Office of Social Justice, et. al.
Community Justice Initiatives of Waterloo Region

County of Cape Breton
Elizabeth Fry Society of Toronto
Edmonton Chamber of Commerce
First Filipino Baptist Church
Greater Nanaimo Chamber of Commerce
Groupe Vie-Plus Etablissement Carceral Leclerc
The John Howard Society of Ottawa
Metro Action Committee on Public Violence Against Women and Children
Office des Droits des Détenu-e-s
St. John's Board of Trade
Social Planning Council of Oshawa-Whitby
Women in Niagara

Judges' Associations

Provincial Court of British Columbia
Provincial Court Judges' Association of New Brunswick
Nova Scotia Provincial Judges' Association
Provincial Judges' Association – Ontario (Criminal Division)

Appendix C

Public Opinion Research

As part of its research program, the Canadian Sentencing Commission sought the views of the Canadian public on many sentencing issues. Surveys were carried out by the Canadian Gallup Poll Limited in 1985 and 1986. The questions were part of their national omnibus survey. Approximately 1,000 individuals were sampled in each survey. Some of the findings were presented and discussed in Chapter 4 of the report. This appendix contains additional findings.

| <i>Table</i> | <i>Title</i> |
|--------------|--|
| Table 1 | Knowledge of minimum penalties |
| Table 2 | Knowledge of minimum penalty for importing |
| Table 3 | Knowledge of maximum penalty for impaired driving |
| Table 4 | Reasons for making sentences harsher |
| Table 5 | Most appropriate sentence to ensure protection of the public |
| Table 6 | Opinion regarding most effective way to control crime |
| Table 7 | Opinion regarding imprisonment for various offences |
| Table 8 | Public knowledge of mandatory supervision and parole |
| Table 9 | Number of years that should be served by people serving life sentences for murder before they become eligible for parole |
| Table 10 | Opinion concerning who should be eligible for parole |
| Table 11 | Opinion concerning the strongest argument in favour of parole, and against parole |
| Table 12 | Perceptions of unwarranted sentencing disparity |
| Table 13 | Perceptions of who is responsible for crime control |

Table 1

Knowledge of minimum penalties

| | % |
|-----------------------|----------|
| No | 36 |
| Murder | 22 |
| Sexual Assault | 12 |
| Assault | 2 |
| Drinking/Driving | 16 |
| Robbery | 12 |
| Break and Enter/Theft | 12 |
| Fraud | 1 |
| Drug-related | 4 |
| Treason | 1 |
| Kidnapping/Hijacking | 1 |
| Other | <u>4</u> |
| | 123* |

*Total exceeds 100 due to multiple responses from some respondents.

Question (1): Can you name an offence that carries a minimum penalty?

Table 2

Knowledge of minimum penalty for importing

| | % |
|------------------------|----------|
| Don't Know | 62 |
| 1 month – 3 years | 16 |
| 37 months – 5 years | 8 |
| 61 months – 78 months | 0 |
| 79 months – 84 months* | 6 |
| Over 85 months | <u>8</u> |
| | 100 |

* Correct.

Question (3): What is the minimum penalty for importing a narcotic?

Knowledge of maximum penalty for impaired driving

Question (4): Recently Parliament changed the maximum penalties for impaired driving. Do you know that the new *maximum penalty* for impaired driving is?

Reasons for making sentences harsher (n = 620)¹

*i.e., points 8, 9, 10 on a 10 point scale.

¹ This question was posed only to those individuals who had previously expressed the view that sentences were too lenient.

Table 5

Most appropriate sentence to ensure protection of the public

| | Minor Offences (%) | Major Offences (%) |
|---|-----------------------|-----------------------|
| A fine | 13 | 2 |
| A period of probation (where the offender is allowed to remain in the community providing he complies with certain conditions) | 22 | 8 |
| A community service order (a condition of probation where an offender is required to perform a specified number of hours in work which provides a service to the community) | 53 | 10 |
| Imprisonment of a greater proportion of offenders | 5 | 33 |
| Imprisonment of offenders for longer periods of time | 4 | 42 |
| Not stated | <u>3</u> 100 | <u>5</u> 100 |

Question (4 and 5): For most offences in the *Criminal Code* a judge has a choice as to the kind of sentence to impose. Consider the case of relatively minor crimes such as theft under \$200 and consider more serious crimes such as assault. Assuming for the moment that the aim of sentencing is protection of the public, please choose the *most* appropriate sentence to achieve that aim.

Table 6

Opinion regarding most effective way to control crime

| | % |
|---|----------|
| Reduce the level of unemployment | 41 |
| Make sentences harsher | 27 |
| Increase the use of non-imprisonment sentencing options such as restitution or community service orders | 13 |
| Increase the number of police | 4 |
| Increase the number of social programs | 10 |
| Other/ Don't know/not stated | <u>5</u> |
| | 100 |

Question (9): Which of the ways listed on this card would in your view be the *single* most effective way to control crime?

Table 7

Opinion regarding imprisonment for various offences

| | Imprisonment | | | |
|----------------------|--------------|-----|-------------|-----|
| | %Yes | %No | %Don't Know | |
| Assault | 74 | 21 | 5 | 100 |
| Theft over \$200 | 64 | 30 | 6 | 100 |
| B/E private dwelling | 63 | 32 | 5 | 100 |
| Impaired driving | 60 | 35 | 5 | 100 |
| Robbery | 59 | 34 | 7 | 100 |
| B/E business premise | 56 | 39 | 5 | 100 |
| Theft under \$200 | 17 | 79 | 4 | 100 |

Question (12): There are a number of different sentences an offender can be given other than a term of imprisonment. These include a fine, a period of probation and/or probation or community service.

In the case of an adult offender with no previous convictions, please tell me, for each offence I read to you, whether in your opinion, and generally speaking, the offender should or should not be sentenced to a term of imprisonment.

Table 8

Public knowledge of mandatory supervision and parole

1. Which of the following best describes mandatory supervision?

| | |
|---|------------|
| a) a period of surveillance to which all inmates are subject upon leaving prison after completing their sentences | 40.3 |
| b) a period of observation that applies to all new prison guards before they can obtain permanent employment | 7.8 |
| c) a form of close observation to which certain inmates are subject during their time in prison | 27.2 |
| d) a form of early release from prison as a result of good behaviour | 15.3 |
| Don't know/not stated | <u>9.4</u> |
| | 100.0 |

Question (1): "First on general knowledge. I'd like you to tell me which one of the phrases or definitions on this card best describes mandatory supervision"

2. Which of the following best describes parole?

| | |
|--|------------|
| a) a period of supervision ordered by a judge as part of a sentence | 17.5 |
| b) a form of early release from prison that inmates must apply for and which is only granted to certain applicants | 34.8 |
| c) a period of close observation to which certain inmates are subject during their time in prison | 10.1 |
| d) a form of early release from prison as a result of good behaviour while in prison | 32.8 |
| Don't know/not stated | <u>4.8</u> |
| | 100.0 |

Question (2): "Now please read these phrases and tell me which one best describes parole".

Table 9

Number of years that should be served by people serving life sentences for murder before they become eligible for parole

| | % |
|-------------------------|------------|
| 1 – 9 years | 1.2 |
| 10 – 19 years | 12.4 |
| 20 – 30 years | 38.6 |
| Should never get parole | 42.1 |
| Don't know/not stated | <u>5.7</u> |
| | 100.0 |

Question (9): “Now, turning to people serving life sentences for murder, how many years should these individuals have to serve in prison before they become eligible for full parole?”

Table 10

Opinion concerning who should be eligible for parole

| | |
|---|------------|
| a) All offenders | 8.9 |
| Only certain offenders | 65.4 |
| Parole should be abolished | 22.5 |
| Don't know/not stated | <u>3.2</u> |
| | 100.0 |
| b) If "only certain offenders", who exactly should never be eligible? | |
| 1. murderers | 80.9 |
| 2. sex offenders | 48.4 |
| 3. child-related offences | 25.8 |
| 4. other | 19.3 |
| 5. habitual criminals | 6.7 |
| 6. Don't know/not stated | <u>4.2</u> |
| | 185.3* |

*Total exceeds 100 due to multiple choices; numbers represent percentage of total responses.

Question (12a): Please look at this card and tell me which comes closest to your opinion? (Read options)

Question (12b): If respondent chooses "only certain offenders" ask what offenders should never be eligible.

Table 11

Opinion concerning the strongest argument in favour of parole, and against parole.

a) Strongest argument for parole

| | |
|----------------------------------|------------|
| 1. Promotes rehabilitation | 21.0 |
| 2. Provides second chance | 32.9 |
| 3. Saves money | 14.1 |
| 4. Provides incentive to inmates | 26.2 |
| 5. Don't know/not stated | <u>5.8</u> |
| | 100.0 |

b) Strongest argument against parole

| | |
|---|------------|
| 1. Recidivism of parolees | 55.5 |
| 2. Undermines sentence of court | 10.3 |
| 3. Undermines deterrent effect of law | 13.6 |
| 4. Introduces uncertainty into sentencing | 12.4 |
| 5. Don't know/not stated | <u>8.2</u> |
| | 100.0 |

Question (15): "Which one of the following is the strongest reason in favour of parole?"

Question (16): "Which one of the following is the strongest reason against parole?"

Table 12

Perceptions of unwarranted sentencing disparity

| | Overall | Excluding "Don't know" |
|-------------------------|-------------|---------------------------|
| Yes, it is a problem | 72.5 | 82.5 |
| No, it is not a problem | 15.4 | 17.5 |
| Don't know/not stated | <u>12.1</u> | <u>—</u> |
| | 100.0 | 100.0 |

Question (19): "One topic that has been discussed recently concerns sentencing disparity. This refers to the possibility that *similar* offenders, convicted of *similar* offences, sometimes receive *dissimilar* sentences. From what you know about sentencing in Canada do you think this is a problem or not?"

Table 13

Perceptions of who is responsible for crime control

| | |
|---|------------|
| Police | 8.3 |
| Courts | 24.3 |
| Corrections (including parole) | 5.7 |
| Elsewhere (e.g., employment and community programs) | 9.6 |
| Society generally | 47.2 |
| Other | 1.3 |
| Don't know/not stated | <u>3.6</u> |
| | 100.0 |

Question (22): "Although reducing crime is a responsibility shared by many, where do you think the *main* responsibility lies?"

Appendix D

Criminal Law Reform Act, 1984 (Bill C-19) Declaration of Purpose and Principles of Sentencing

(Section 645)

645. (1) It is hereby recognized and declared that the fundamental purpose underlying the imposition of a sentence for an offence is the protection of the public and that this end may be furthered by:
- (a) promoting respect for the law through the imposition of just sentences;
 - (b) separating offenders from society, where necessary;
 - (c) deterring the offender and other persons from committing offences;
 - (d) promoting and providing for redress to victims of offences or to the community; and
 - (e) promoting and providing for opportunities for offenders to become law-abiding members of society.
- (2) Subject to subsection (3), the sentence to be imposed on an offender in a particular case is in the discretion of the court that sentences the offender.
- (3) In furtherance of the purpose set out in subsection (1), a court that sentences an offender for an offence shall exercise its discretion within the limitations prescribed by this or any other Act of Parliament and in accordance with the following principles:
- (a) a sentence should be proportionate to the gravity of the offence, the degree of responsibility of the offender for the offence and any other aggravating or mitigating circumstances;
 - (b) a sentence should be similar to sentences imposed on other offenders for similar offences committed in similar circumstances;

- (c) a sentence should be the least onerous alternative appropriate in the circumstances;
- (d) the maximum punishment prescribed should be imposed only in the most serious cases of the commission of the offence;
- (e) the court should consider the total effect of the sentence and the combined effect of that sentence and any other sentence imposed on the offender;
- (f) a term of imprisonment should be imposed only
 - (i) to protect the public from a violent or dangerous offender,
 - (ii) where a less restrictive alternative would not adequately protect the public or the integrity of the administration of justice or sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or
 - (iii) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender; and
- (g) a term of imprisonment should not be imposed, or its duration determined solely for the purpose of rehabilitation.

Appendix E

List of Offences with Proposed Maximum Penalties and Presumptive Dispositions

This appendix contains a listing of all offences in the *Criminal Code*, *Narcotic Control Act* and *Food and Drugs Act (Parts III, IV)*. They were ranked in terms of their seriousness by the Commissioners (see Chapter 9) and are presented here from most to least serious levels of proposed penalty bands. Within the bands, offences are listed in sequence in accordance with their section numbers as they appear in the relevant statutes. In addition, the presumptive dispositions recommended by the Commission are indicated. Thus “IN” means unqualified presumption of incarceration, “OUT” means unqualified presumption of community sanction, “QI” means qualified in and “QO” means qualified out. (See Chapter 11 for further details).

NOTES

1. Current and proposed maxima in years unless otherwise stated (m = months).
2. An asterisk (*) beside a current maximum denotes a hybrid offence under current penalty provisions. The maximum penalty accompanying these offences is that prescribed for indictable cases.

Schedule of Proposed Seriousness Levels and Presumptive Dispositions

12 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|---------------|----------------------------|
| Life | Treason, rebellion/conspiracy, attempted high treason | s.47(2)(a) | IN |
| Life | Passing secrets or conspiracy to do so when at war | s.47(2)(b) | IN |
| Life | Hijacking | s.76.1 | IN |
| Life | Endangering aircraft in flight | s.76.2 | IN |
| Life | Causing an explosion, intent to cause death, bodily harm | s.79(1)(a)(b) | IN |
| Life | Causing death by criminal negligence | s.203 | IN |
| Life | Manslaughter | s.219 | IN |
| Life | Killing unborn child in act of birth | s.221 | IN |
| Life | Attempt to commit murder | s.222 | IN |
| Life | Interfering with transportation facilities | s.232 | IN |
| Life | Aggravated sexual assault | s.246.3 | IN |
| Life | Kidnapping | s.247(1) | IN |
| Life | Hostage Taking | s.247.1 | IN |
| | Attempts, accessories – indictable offences punishable by life | s.421(a) | IN |
| 14 | Conspiracy to commit murder | s.423(1)(a) | IN |
| Life | Trafficking and possession for purpose | NCA s.4 | IN |
| Life | Import/Export | NCA s.5 | IN |

9 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|----------------|----------------------------|
| 14 | Passing secrets or conspiring to do so <i>but not state of war</i> | s.47(2)(c) | IN |
| 14 | Alarming her Majesty/intended to cause bodily harm | s.49 | IN |
| 14 | Assisting alien enemy to leave Canada/Omitting to prevent treason | s.50 | IN |
| 14 | Intimidating Parliament | s.51 | IN |
| 10 | Sabotage | s.52 | IN |
| 14 | Inciting to mutiny | s.53 | IN |
| Life | Piracy | s.75 | IN |
| 14 | Piratical acts | s.76 | IN |
| 14 | Board offensive weapon | s.76.3 | IN |
| Life | Breach of Duty of care <i>re</i> explosives causes death | s.78(a) | IN |
| 14 | Acceptance or attempt to bribe judicial officers M.P., M.L.A. | s.108(1)(a)(b) | IN |
| 14 | Perjury | s.120, 121 | IN |
| Life | Perjury | s.120, 121 | IN |
| 14 | Witness giving contradictory evidence | s.124 | IN |
| 14 | Fabricating evidence | s.125 | IN |
| Life | Sexual intercourse with female under 14 | s.146(1) | IN |
| Life | Accessory to murder | s.223 | IN |
| 14 | Causing bodily harm with intent | s.228 | IN |
| Life | Overcoming resistance to commission of offence | s.230 | IN |
| 14 | Dangerous operation of motor vehicle, vessel, aircraft where death caused | s.233(4) | IN |

9 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|----------------|----------------------------|
| 14 | Impaired operation of motor vehicle, etc., causing death | s.237/239(3) | IN |
| 14 | Aggravated assault | s.245.2 | IN |
| 14 | Sexual assault with weapon/ bodily harm | s.246.2 | IN |
| Life | Robbery | s.302/303 | IN |
| Life | Extortion | s.305 | IN |
| Life | Wilful mischief causing dan- ger to life | s.387(2) | IN |
| 14 | Arson (specific types) | s.389(1) | IN |
| 5 | Arson (others) | s.389(2) | IN |
| 10* | Conspiracy to prosecute knowing person innocent – offences punishable by life or fourteen years | s.423(1)(b)(i) | QO |
| 10* | Trafficking and possession for purpose | FDA s.34 | IN |
| 10 | Trafficking and possession for purpose | FDA s.42 | IN |

6 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|---------------|----------------------------|
| 14 | Forging passport/using forged passport | s.58(l) | QO |
| 14 | Seditious offences | s.62 | QO |
| 14 | Breach of Duty of care <i>re</i> explosives causes bodily harm | s.78(b) | QI |
| 14 | Placing explosive/making or/ has in care and control | s.79(l)(c)(d) | QI |
| 14 | Use of firearm during com- mission of offence | s.83 | IN |
| 10 | Carrying weapon or imitation for dangerous purposes | s.85 | QO |
| 5* | Importing or delivering | s.93 | QI |
| 5* | Importation of restricted weapons | s.94(3) | QI |
| 14 | Bribery of officers | s.109 | IN |
| 5 | Frauds upon the government | s.110(l) | QO |
| 5 | Breach of trust, public officer | s.111 | QO |
| 10 | Obstructing Justice | s.127(2) | QO |
| 10 | Prison breach | s.132 | IN |
| 14 | Incest | s.150 | IN |
| 14 | Parent or guardian procuring defilement of female under 14 | s.166(c) | IN |
| 5 | Parent or guardian procuring defilement, 14 years or older | s.166(d) | IN |
| 10 | Procuring | s.195 | QO |
| 10 | Causing bodily harm by criminal negligence | s.204 | IN |
| 14 | Counselling or aiding suicide | s.224 | QO |
| 14 | Administering noxious thing intends harm to life | s.229(a) | IN |

6 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|-----------------|----------------------------|
| 5 | Traps likely to cause death/bodily harm | s.231 | IN |
| 10 | Dangerous operation of motor vehicle, vessel, aircraft where bodily harm caused | s.233(3) | IN |
| 10 | Impaired operation of vehicle where bodily harm | s.237/239(2) | IN |
| 10 | Impeding attempt to save life | s.243.2 | IN |
| 10 | Assault causing bodily harm or with a weapon | s.245.1 | QI |
| 10 | Unlawfully causing bodily harm | s.245.3 | QI |
| 10 | Sexual assault | s.246.1 | QI |
| 10 | Forcible confinement | s.247(2) | IN |
| 10 | Theft over \$1000 | s.283/294(a) | QO |
| 14 | Criminal breach of trust | s.296 | QO |
| 10 | Theft of cattle | s.298(1.1) | QO |
| 10 | Destroying documents of title | s.300 | QO |
| 10 | Unauthorized use of computer | s.301.2 | QO |
| Life | Stopping mail with intent | s.304 | QO |
| Life | Break and enter dwelling house | s.306(1)(d) | QI |
| 10 | Possession of property obtained by crime over \$1000 | s.312/313(a) | QO |
| 10 | False pretence leading to theft over \$1000 | s.319/320(2)(a) | QO |
| 14 | Forgery | s.325(1) | QO |
| 14 | Uttering forged document | s.326(1) | QO |
| 14 | Making, using or possessing exchequer bill paper, public seals, without authority | s.327 | QO |

6 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|-------------|----------------------------|
| 14 | Drawing up a document without authority, etc., with intent to defraud | s.332 | QO |
| 14 | Obtaining, etc., by instrument based on forged document | s.333 | QO |
| 14 | Counterfeiting/possessing instrument to counterfeit stamps | s.334(1) | QO |
| 14 | Making, use or selling of a mark without lawful authority | s.334(2) | QO |
| 10 | Fraud over \$1000 | s.338(1)(a) | QO |
| 10 | False prospectus, etc. | s.358 | QO |
| 14 | Selling defective stores to her Majesty | s.376(1) | QO |
| 14 | Fraud in relation to defective stores | s.376(2) | QO |
| 10* | Wilful mischief in relation to testamentary instrument or property worth over \$1,000 | s.387(3) | QO |
| 10* | Wilful mischief in relation to data | s.387(5) | QO |
| 14 | Attack of premises, internationally protected persons. | s.387.1 | IN |
| 14 | Making of counterfeit money | s.407 | IN |
| 14 | Possession, buying or receiving or offering to buy/receive counterfeit money | s.408 | IN |
| 14 | Uttering, etc., counterfeit money | s.410 | IN |
| 14 | Making, having or dealing in instruments for counterfeiting | s.416 | IN |

3 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|-----------|----------------------------|
| 5 | Possession of forged passport | s.58(3) | QO |
| 5 | Offences in relation to military forces | s.63 | QO |
| Life | Offences related to proclamation | s.69 | QO |
| 5 | Unlawful military drilling | s.71(3) | QO |
| 5 | Unlawful possession of explosive | s.80 | QO |
| 5* | Pointing firearm | s.84(1) | QO |
| 5* | Possession of prohibited weapon | s.88(1) | QO |
| 5* | Occupant of motor vehicle – prohibited weapon | s.88(2) | QO |
| 5* | Possession elsewhere than place authorized | s.89(2) | QO |
| 5* | Restricted weapon in motor vehicle | s.89(3) | QO |
| 5* | Wrongful delivery of firearms | s.92 | QO |
| 5* | Delivery of restricted weapon to person without permit | s.94(1) | QO |
| 5* | Possession of firearm, ammunition, etc., while prohibited by order | s.98(12) | QI |
| 5* | Possession of firearm, ammunition, while prohibited by order | s.101(10) | QI |
| 5* | Finding a prohibited weapon/lost weapon | s.102(5) | QO |
| 5* | Offences relating to business of firearms | s.103(8) | QO |
| 5 | Contractor subscribing to election fund | s.110(2) | QO |

3 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|-----------------|----------------------------|
| 5 | Municipal Corruption | s.112(1)(2) | QO |
| 5 | Selling/purchasing office | s.113 | QO |
| 5 | Influencing or negotiating appointments | s.114 | QO |
| 5* | Public mischief | s.128 | QO |
| 5* | Corruptly taking reward for recovery of goods | s.130 | QO |
| 2* | Escape and being at large without excuse | s.133(1) | IN |
| 5 | Permitting escape | s.135 | QI |
| 5 | Assisting Prisoner of war to escape | s.136 | IN |
| 5 | Sexual intercourse with female 14 to 16 | s.146(2) | IN |
| 2 | Sexual intercourse with step-daughter, etc. | s.153(1)(a) | QO |
| 14 | Buggery or bestiality | s.155 | QO |
| 5 | Householder permitting defilement | s.167 | QO |
| 5 | Interception of communication | s.178.11 | QO |
| 5 | Infanticide | s.220 | QO |
| 5* | Dangerous operation of motor vehicle, vessel, where no injury | s.233(2) | QO |
| 5 | Lending unseaworthy vessel or aircraft | s.235 | QO |
| 5* | Operation of motor vehicle, vessel or aircraft while impaired, no harm caused | s.237(a)/239(1) | QO |
| 5* | Operation of motor vehicle, vessel or aircraft, exceeding .08, no bodily harm caused | s.237(b)/239(1) | QO |

3 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|---------------|----------------------------|
| 5* | Refusal to provide breath or blood sample | s.238 | QO |
| 5 | Uttering threats to cause death or serious bodily harm | s.243.4(1)(a) | QO |
| 5 | Abduction of person under 16 years | s.249 | QO |
| 10 | Abduction of person under 14 years | s.250 | QO |
| 10 | Abduction in contravention of custody order | s.250.1 | QO |
| 10 | Abduction no custody order | s.250.2 | QO |
| Life | Procuring miscarriage | s.251(1) | QO |
| 5 | Extortion by libel | s.266 | QO |
| 5 | Advocating genocide | s.281.1 | QI |
| 2* | Inciting or wilfully promoting hatred | s.281.2 | QI |
| 14 | Public servant refusing to deliver property | s.297 | QO |
| 5 | Fraudulently taking cattle or defacing brand | s.298(1) | QO |
| 5* | Criminal interest rate | s.305.1 | QO |
| 14 | Breaking and entering other than a dwelling house | s.306(1)(e) | QO |
| 10 | Being unlawfully in dwelling house | s.307 | QO |
| 14 | Possession of housebreaking instruments | s.309(1) | QO |
| 10 | Disguise with intent | s.309(2) | QO |
| 10 | Theft from mail | s.314 | QO |
| 10 | Bringing into Canada property obtained by crime | s.315 | QO |

3 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|----------------|----------------------------|
| 10 | Obtaining credit by false pre- tence | s.320(3) | QO |
| 5 | Damaging documents | s.335 | QO |
| 10* | Fraud affecting public mar- ket prices | s.338(2) | QO |
| 5 | Fraudulent manipulation of stock exchange transactions | s.340 | QO |
| 5 | Gaming in stock or merchan- dise | s.341(1)(a)(b) | QO |
| 5 | Broker reducing stock by selling own account | s.342 | QO |
| 5 | Fraudulent registration of title | s.344 | QO |
| 10 | Offences regarding mines | s.354 | QO |
| 5 | False return by public officer | s.357 | QO |
| 14 | Fraudulent personation with intent to gain advantage | s.361 | QO |
| 5 | Acknowledging instrument in false name (recognizance of bail, etc.) | s.363 | QO |
| 5* | Criminal breach of contract | s.380 | QO |
| 5 | Threat to commit offences against internationally pro- tected persons | s.381.1 | QI |
| 5 | Secret commissions (by agents and principals) | s.383 | QO |
| 5* | Wilful act or omission to act, likely to cause danger to life or mischief to property | s.387(5.1) | QO |
| 5 | Setting fire to substances not mentioned in s. 389 | s.390(a)(b) | QO |
| 5 | Interfering with the saving of a wreck | s.394(1) | QO |

3 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|-----------------|----------------------------|
| 10 | Wilful interference (altering, removing) signals | s.395(2) | QO |
| 5 | Interfering with international boundary marks | s.399 | QO |
| 5 | Injuring cattle | s.400 | QO |
| 5 | Advertising and dealing in counterfeit money, etc. | s.418 | QO |
| 5 | Conspiracy to prosecute knowing person innocent – offences punishable by less than fourteen years | s.423(1)(b)(ii) | QO |
| 7* | Failure to disclose previous prescriptions | NCA s.3.1 | QO |
| 3* | Failure to disclose previous prescriptions | FDA s.33.1 | QO |

1 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|------------|----------------------------|
| 2 | False statement to procure passport | s.58(2) | QO |
| 2 | Fraudulent use of certificate of citizenship | s.59 | QO |
| 2 | Riot | s.66 | QO |
| 2 | Duelling | s.72 | QO |
| 5* | Careless use/storage | s.84(2) | QO |
| 5* | Carrying concealed weapon – no permit | s.87 | QO |
| 5* | Possession of unregistered restricted weapon | s.89(1) | QO |
| 2* | Transfer of firearm to person under 16 | s.91 | QO |
| 2* | Delivery of firearm to person without F.A.C. | s.95(1) | QO |
| 2* | Acquisition of firearms without F.A.C. | s.95(3) | QO |
| 5* | False statements to procure firearms certificate, etc. | s.106.5(1) | QO |
| 2* | Tampering with firearms certificate | s.106.5(2) | QO |
| 2* | Failing to comply with condition of firearm permit | s.106.5(3) | QO |
| 2 | Disobeying a statute | s.115 | OUT |
| 2 | Disobey order of Court | s.116 | QO |
| 2 | Misconduct of officers executing process | s.117 | OUT |
| 2* | Offences relating to public or peace officers | s.118 | QO |
| 2 | Offences relating to affidavits | s.126 | QO |
| 2 | Compounding indictable offence | s.129 | QO |

1 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|------------------|----------------------------|
| 2 | Permitting escape | s.134 | QI |
| 2 | Corrupting morals | s.159/165 | OUT |
| 2 | Tied sale for obscene publica- tions | s.161/165 | OUT |
| 2 | Restriction on publication of report of judicial proceedings | s.162/165 | OUT |
| 2 | Corrupting children | s.168 | QO |
| 2 | Obstructing or violence to or arrest of officiating clergy- man | s.172(l) | OUT |
| 2 | Common nuisance | s.176 | OUT |
| 5 | Breach of duty regarding dead body | s.178 | QO |
| 2 | Possession of device | s.178.18 | OUT |
| 2 | Disclosure of information | s.178.2 | OUT |
| 2* | Failing to provide necessities | s.197 | OUT |
| 2 | Abandoning child | s.200 | QO |
| 2 | Concealing body of child | s.227 | QO |
| 2 | Administering noxious thing to aggrieve | s.229(b) | OUT |
| 2* | Failure to stop at scene of accident | s.236 | QO |
| 2* | Operating motor vehicle, ves- sel, aircraft while disqualified | s.242(4) | QO |
| 2* | Uttering threats to damage property or injure or kill ani- mal | s.243.4(1)(b)(c) | OUT |
| 5* | Assault | s.244/245 | OUT |
| 5* | Assaulting peace officer/ resisting arrest | s.246(2) | QO |
| 5 | Bigamy | s.255 | OUT |

1 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|-------------|----------------------------|
| 5 | Procuring feigned marriage | s.256 | OUT |
| 5 | Polygamy | s.257 | OUT |
| 5 | Taking possession, etc., of drift timber | s.299(l) | OUT |
| 10* | Theft, forgery of credit card | s.301.1 | OUT |
| 2 | Selling, etc., auto master key w/o licence | s.311(l) | OUT |
| 5 | Obtaining execution of valu- able security by fraud | s.321 | QO |
| 5 | Counterfeit proclamation, etc., that falsely purports to have printed by the Queen's Printer | s.328 | OUT |
| 5 | Conveying a telegram with false information | s.329 | OUT |
| 5 | Issuing of false records or certificates by an authorized person | s.336(a)(c) | OUT |
| 5 | Fraudulent issue of records or certificates by an unau- thorized person | s.336(b) | OUT |
| 2 | Using mails to defraud | s.339 | OUT |
| 2 | Fraudulent concealment or use of title documents | s.343 | OUT |
| 2 | Fraudulent sale of real prop- erty | s.345 | OUT |
| 2 | Misleading receipt | s.346 | OUT |
| 2 | Fraudulent disposal of goods on which money advanced | s.347 | OUT |
| 2 | Fraudulent receipts under the Bank Act | s.348 | OUT |
| 2 | Disposal or acceptance of property to defraud creditors | s.350 | OUT |

1 Year Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|-------------|----------------------------|
| 5 | Fraud in relation to minerals | s.352 | QO |
| 5 | Falsifying books or documents | s.355 | QO |
| 2 | Trader failing to keep accounts | s.360 | OUT |
| 2* | Offences with respect to trade marks | s.370 | OUT |
| 2 | Applying or removing distinguishing marks without authority | s.375(1) | OUT |
| 5* | Buying, receiving military stores from a member of the forces, without leave | s.378 | OUT |
| 2* | Mischief in relation to other property | s.387(4)(a) | OUT |
| 5 | Setting fire by negligence | s. 392(1) | QO |
| 2 | Removing of natural bars necessary to a public harbour | s.396 | OUT |
| 5 | Occupant injuring building to the prejudice of a mortgage/owner | s.397 | OUT |
| 5 | Having clippings obtained from current gold or silver coins | s.409 | OUT |
| 2 | Uttering coin | s.411 | OUT |
| 14 | Clipping and uttering clipped coins | s.413 | OUT |
| 14 | Conveying instruments for coining out of mint | s.417 | OUT |
| 7 | Cultivation | NCA s.6 | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|---|------------|----------------------------|
| 6m | Assisting deserter | s.54 | OUT |
| 6m | Counselling/concealing/aid- ing deserter from R.C.M.P. | s.57 | OUT |
| 6m | Unlawful assembly | s.67 | OUT |
| 2 | Police officer neglecting to suppress riot | s.70 | OUT |
| 2* | Forcible entry and detainer | s.74 | OUT |
| 6m | Engaging in prize fight | s.81 | OUT |
| 6m | Weapon in possession while attending public meeting | s.86 | QO |
| 6m | Failing to deliver up firearms certificate | s.106.5(4) | OUT |
| 6m | Personating a peace officer | s.119 | QO |
| 6m | False statement where not permitted or required to make statement | s.122.1 | OUT |
| 2* | Prohibition of bail bondsmen | s.127(1) | QO |
| 6m | Advertising reward and immunity (stolen goods) | s.131 | OUT |
| 2* | Failure to attend court when at large on undertaking or recognizance or failing to attend as required by court | s.133(2) | QO |
| 2* | Failure to comply with condi- tion of undertaking or recog- nizance | s.133(3) | QO |
| 2* | Failing to appear with respect to summons | s.133(4) | QO |
| 2* | Failing to appear, appearance notice/promise to appear | s.133(5) | QO |
| 2 | Seduction of female passen- gers 16 to 18 | s.151 | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|--------------|----------------------------|
| 2 | Seduction under promise of marriage | s.152 | OUT |
| 2 | Sexual intercourse with female employee | s.153(l)(b) | OUT |
| 2 | Seduction of female passengers on vessels | s.154 | OUT |
| 5 | Acts of gross indecency | s.157 | OUT |
| 2* | Immoral theatrical performance | s.163/165 | OUT |
| 2* | Mailing obscene matter | s.164/165 | OUT |
| 6m | Indecent acts | s. 169 | OUT |
| 6m | Nude in public place | s. 170 | OUT |
| 6m | Causing disturbance, indecent exhibition, loitering | s. 171 | OUT |
| 6m | Disturbing religious worship or certain meetings | s.172(2),(3) | OUT |
| 6m | Trespassing at night | s.173 | OUT |
| 6m | Offensive volatile substance | s.174 | OUT |
| 6m | Vagrancy, loitering | s.175 | OUT |
| 2 | Spreading false news | s.177 | OUT |
| 2 | Keeping a common gaming house or common betting house | s.185(1) | OUT |
| 6m | Person found in or owner of gaming house | s.185(2) | OUT |
| 2 | Betting, pool-selling, book-making, etc. | s.186 | OUT |
| 2 | Placing bets for others | s.187 | OUT |
| 2* | Fail to comply with regulations re: pari-mutual system | s.188(8) | OUT |
| 2 | Offence in relation to lotteries and games of chance | s.189(l) | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|-------------|----------------------------|
| 6m | Purchaser of lot, ticket | s.189(4) | OUT |
| 2 | Conducting unauthorized lottery | s.190(3) | OUT |
| 6m | Receiving unauthorized lottery ticket | s.190(4) | OUT |
| 2 | Cheating at play | s.192 | OUT |
| 6m | Keeping common bawdy-house | s.193(1) | OUT |
| 6m | Landlord, inmate of common bawdy-house | s.193(2) | OUT |
| 6m | Transporting person to bawdy-house | s.194 | OUT |
| 6m | Soliciting | s.195.1 | OUT |
| 5 | Neglect to obtain assistance in childbirth | s.226 | QO |
| 6m | Failing to keep watch on person towed | s.234(1) | OUT |
| 6m | Towing a person after dark | s.234(2) | OUT |
| 6m | Failing to safeguard opening in ice, etc. | s.243.3(c) | OUT |
| 6m | Publication of evidence concerning sexual activity | s. 246.6(5) | OUT |
| 2 | Woman procuring her miscarriage | s.251(2) | OUT |
| 2 | Supplying noxious things | s.252 | OUT |
| 2 | Pretending to solemnize marriage | s.258 | OUT |
| 2 | Marriage contrary to law | s.259 | OUT |
| 2 | Blasphemous libel | s.260 | OUT |
| 5 | Punishment of libel known to be false | s.264 | OUT |
| 2 | Punishment for defamatory libel | s.265 | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|-----------------|----------------------------|
| 2* | Theft under \$1000 | s.283/294(b) | OUT |
| 2 | Possession of device to obtain telecommunication service | s.287.1 | OUT |
| 6m | Taking motor vehicle without consent | s.295 | OUT |
| 6m | Dealer in second-hand goods trading lumber equipment without written consent | s.299(2) | OUT |
| 2 | Fraudulent concealment | s.301 | OUT |
| 2 | Possession of instruments for breaking into coin operated exchange devices | s.310 | OUT |
| 6m | Failing to keep record of transaction in auto master keys | s.311(4) | OUT |
| 2* | Possession of property obtained by crime under \$1000 | s.312/313(b) | OUT |
| 2* | False pretence leading to theft under \$1000 | s.319/320(2)(b) | OUT |
| 6m | Fraudulently obtaining food and lodging | s.322(l) | OUT |
| 6m | Pretending to practice witchcraft | s.323 | OUT |
| 2 | False messages with intent to injure or harm | s.330(l) | OUT |
| 6m | Indecent telephone calls | s.330(2) | OUT |
| 6m | Harassing telephone calls | s.330(3) | OUT |
| 2* | Fraud under \$1000 | s.338(l)(b) | OUT |
| 6m | Fraud in relation to fares, etc. | s.351(l) | OUT |
| 6m | Bribing fare collector | s.351(2) | OUT |
| 6m | Unlawfully obtaining transportation | s.351(3) | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|----------|----------------------------|
| 6m | Falsifying employment record | s.356 | OUT |
| 6m | Obtaining carriage by false billing | s.359(1) | OUT |
| 6m | Falsely personating a candidate at an examination | s.362 | OUT |
| 6m | Falsely representing that goods are made by a person holding a royal warrant, etc. | s.371 | OUT |
| 2* | Offences in relation to wrecked vessel | s.373 | OUT |
| 2* | Reception, possession or delivery of public stores | s.375(2) | OUT |
| 6m | Unlawful use of military uniforms or certificates | s.377 | OUT |
| 6m | Intimidation | s.381 | OUT |
| 6m | Offences by employers re: trade unions | s.382 | OUT |
| 6m | Issuing trading stamps, employee, agent | s.384(1) | OUT |
| 6m | Issuing trading stamps, merchant, dealer | s.384(2) | OUT |
| 2* | False alarm of fire | s.393 | OUT |
| 6m | Interfering with the saving of wreck | s.394(2) | OUT |
| 6m | Interfering with marine signals | s.395(1) | OUT |
| 6m | Interfering with boundary marks, etc. | s.398 | OUT |
| 6m | Injuring or endangering other animals | s.401 | OUT |
| 6m | Causing unnecessary suffering (to animals or birds) | s.402(2) | OUT |
| 6m | Ownership, custody or control of animal or bird when prohibited from so doing | s.402(6) | OUT |

6 Month Maximum

| Current Maximum | Offence | Section | Presumptive Disposition |
|--------------------|--|--------------|----------------------------|
| 6m | Keeping of cock-pits | s.403 | OUT |
| 6m | Manufacturing or possession of tokens | s.412 | OUT |
| 6m | Defacing current coins | s.414 | OUT |
| 6m | Printing of circulars, etc., in likeness of notes | s.415(a),(b) | OUT |
| 6m | Printing anything in likeness of notes | s.415(2) | OUT |
| 6m | Breach of court order restricting public and publicity | s.442(4) | OUT |
| 6m | Publication concerning search, before charges laid | s.443.2 | OUT |
| 6m | Failure to comply with a court order directing matters not to be published | s.457.2(2) | OUT |
| 6m | Failure to comply with order restricting publication of evi- dence taken at a preliminary inquiry | s.467(3) | OUT |
| 6m | Failure to comply with a restriction on publication when a jury is not present | s.576.1 | OUT |
| 6m | Disclosure of jury proceed- ings | s.576.2 | OUT |
| 3m | Contempt of court | s.636 | QO |
| 6m | Failure to comply with a pro- bation order | s.666 | QO |
| 6m | Breach of recognizance | s.746 | OUT |
| 7* | Possession of narcotic | NCA s.3 | OUT |
| 3* | Possession of restricted drug | FDA s.41 | OUT |

* See note p. 493.

Attempts – Conspiracies – Accessories

Except as otherwise expressly provided in the legislation, the following rule applies to attempts, conspiracies and accessories (see *Criminal Code* subsections 421, 422, 423 for offence descriptions and penalties).

1. Everyone who attempts to commit or is an accessory after the fact to the commission of any offence is liable to imprisonment for a term that is one-half the longest term prescribed for that offence as well as being subject to the same presumptive disposition.
2. Everyone who counsels, procures or incites another person to commit any offence is liable to the same maximum penalty to which a person who attempts to commit that offence is liable and subject to the same presumptive disposition.
3. Everyone who conspires to prosecute a person for an alleged offence, knowing that he did not commit that offence is liable to the same maximum penalty to which a person who attempts to commit that offence and is subject to the same presumptive disposition.

Appendix F

Guideline Prototypes

This appendix contains prototype sheets for selected offences. Each prototype contains: (i) an offence description; (ii) proposed maximum penalty; (iii) presumptive disposition; (iv) guidelines range; (v) information on current practice (where available); and (vi) information on case law (where available). These offences were selected to represent a variety of offences.

Notes:

1. Current practice: The Canadian Sentencing Commission drew most heavily upon two sources of information. These were (A) Correctional Sentences Project, and (B) Canadian Sentencing Commission Project.

(A) *Correctional Sentences Project*: this was a study undertaken for the Department of Justice in consultation with the Canadian Sentencing Commission. It documented the sentences given to admissions to provincial and federal correctional institutions during the fiscal year 1984-85. Not all provinces were able to supply information for all offences. Also, the data on custodial terms are presented in intervals (e.g., 36-42 months). For the sake of brevity a single value has been entered in these guideline sheets. The reader is urged to consult the reports (Hann and Kopelman, 1986) of these data for further details of the project.

(B) *Canadian Sentencing Commission Project*: with the co-operation of the Canadian Centre for Justice Statistics, the Canadian Sentencing Commission compiled a data-base derived from the fingerprint files of the R.C.M.P. This included a sub-set of the offences covered in the Correctional Sentences Project. It covered the years 1983-84. Since this source was not designed to provide systematic, accurate sentencing data, it suffers from certain deficiencies, most notably with respect to undercoverage of certain dispositions, for some offences. The Commission was made aware of these deficiencies by the Canadian Centre for Justice Statistics. The reader is directed to a recent publication by the Department of Justice (Hann and Harman,

1986) for a full discussion of this data-base. Whenever possible, sentencing trends were cross-checked using both data-bases, as well as earlier work by the Department of Justice (Hann et al. 1983). It would not be surprising if the two sources revealed quite different pictures of sentencing. They cover different time-periods and reflect very different biases. However it can be said with some confidence that the picture of sentencing which emerges from the two sources is quite similar. The reader can verify this by comparing the medians and 90th percentiles provided by the different sources.

2. The data on current practice presented here reflect the current sentencing process, including the possibility of full release on discretionary parole as early as one-third of the sentence and release on mandatory supervision at the two-thirds mark. The proposals of the Sentencing Commission abolish discretionary release on full parole and reduce remission to one-quarter of the sentence. Thus, a three year sentence under the system proposed by the Commission would be significantly more severe than a three year sentence imposed under the current system.
3. These prototypes are designed to provide the reader with an idea of the kind of information contained in a guideline sheet .
4. For further discussion of maximum penalties, see Chapter 9.
5. For further discussion of presumptive dispositions and guidelines, see Chapter 11.

Guideline Prototype

| | |
|--------------------------------------|---|
| I. Offence: | Manslaughter s.219, <i>Criminal Code</i> |
| II. Maximum: | 12 Years |
| III. Presumptive Disposition: | Presumption of Custody (IN) |
| IV. Guidelines: | Range: 4 – 6 Years |

Advisory Information

V. Current Practice

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 215, 217, 219

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)*</i> | <i>75th</i> | <i>90th**</i> |
|-----------------------------------|-------------|-----------------------|-------------|---------------|
| Correctional Sentences Project | 3.5y | 5y | 10y | 10y |
| Sentencing Commission | | 5y | 12y | |

- * The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.
- ** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for manslaughter during this period was 12 years (Sentencing Commission). This means that of all offenders who were convicted of manslaughter *and* who were sent to prison, 90% received terms of imprisonment that were 12 years or below.

VI. Case Law:

1. Description:
 - “manslaughter is of course a crime which varies very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder.” *R v. Cascoe* (1970), 54 Cr. App. R. 401 (C.A.) [British case]

- “There are certain cases of manslaughter where the line between crime and accident is narrow... *The Queen v. Gregor* (1953), 31 M.P.R. 99 (N.S.S.C.)

2. Aggravating and Mitigating Factors:

a) *Aggravating*

- i) Premeditation:
 - callousness of the preparation. *R. v. Warner, Urquhart, Martin and Mullen*, [1946] O.R. 808 (Ont. C.A.)
- ii) Victim Stranger:
 - where the offender is a danger to the public as seen by the fact that victim was a total stranger. *R. v. Johnson* (1971), 4 C.C.C. (2d) 226 (Ont. C.A.)
- iii) Age of victim:
 - where the victim is a child. *R. v. Bezeau* (1958), 28 C.R. 301 (Ont. C.A.)
- iv) Alcohol involved:
 - where alcohol was involved. *R. v. Sadowski* (1968), 3 C.R.N.S. 269 (Ont. C.A.)
 - where offender is an incurable alcoholic and presents a continuing danger. *R. v. Empey* (1978), 4 C.R. (3d) S-59 (Ont. C.A.)
- v) Criminal record:
 - where the record is lengthy and involves violence. *R. v. MacDonald* (1974), 27 C.R.N.S. 212 (Ont. C.A.)

b) *Mitigating*

- i) Domestic context:
 - where the death occurs as a result of a domestic quarrel involving relatives or friends. *R. v. Muttart* (1971), Nfld. & P.E.I.R. 404 (P.E.I. C.A.)
 - where the accused is a mother and her incarceration would adversely affect her children, alternatives should be used. *R. v. Henry* (1977), 20 Crim. L.Q. 139 (Que. C.A.)
 - where the victim is a child, the “domestic context” no longer operates as a mitigating factor. *R. v. Bezeau* (1958), 28 C.R. 301 (Ont. C.A.) *R. v. Bompas* (1959), 123 C.C.C. 39 (Alta. S.C.) unless parents have personality defect (i.e. suffer from mental retardation) *R. v. Antone and Antone* (1977), 20 Crim. L.Q. 143 (Ont. C.A.)

- where the offender repeatedly assaulted the victim (usually his wife) in the past, this will also negate the mitigating effect of the “domestic context”. *R. v. MacDonald* (1974), 27 C.R.N.S. 212 (Ont. C.A.)
- ii) Intoxication:
 - where the accused was drunk and only intended to frighten the victim. *R. v. Baldhead*, [1966] 4 C.C.C. 183 (Sask. C.A.)
- iii) Native offender:
 - where the offender is native and for whom a penitentiary sentence would involve being sent away from the remote area in which he lived without contact with the outside world. *R. v. Fireman* (1971), 4 C.C.C. (2d) 82 (Ont. C.A.)
- iv) Inadvertance:
 - where death was the result of inadvertance on the part of the offender. *R. v. O'Neill* (1966), 51 Cr. App. R. 241 (C.A.)
- v) Provocation:
 - where the offender was provoked or acting in self-defence. *R. v. Muttart* (1971), 1 Nfld. and P.E.I.R. 404 (P.E.I.C.A.)
- vi) Offender's suffering:
 - where the offence itself carries with it an inherent punishment (i.e. killing a member of one's own family or being seriously disfigured or maimed as a result of the incident. *R. v. Beckner* (1984), 15 C.C.C. (3d) 244 (Ont. C.A.) *A.G. of Quebec v. Rubio* (1984), 39 C.R. (3d) 67 (Que. S.C.)
- vii) Other factors:
 - include previous good character of the accused, the unlikely repetition of the crime and the age of the accused. *The Queen v. Gregor* (1953), 31 M.P.R. 99 (N.S.S.C.)

Guideline Prototype

- I. Group of Offences:** Theft Over \$1000
s.283/294(a), *Criminal Code*
Possession of Property obtained by Crime Over \$1000
s.312/313(a), *Criminal Code*
False Pretence Leading to Theft Over \$1000
s.319/320(2)(a), *Criminal Code*
Fraud Over \$1000 or Pertaining to a Testamentary Instrument
s.338(1)(a), *Criminal Code*
- II. Maximum:** 6 Years
- III. Presumptive Disposition:** Qualified Presumption of Non-Custody (QO) (i.e. “out” unless it is a serious instance of the offence *and* the offender has a relevant criminal record).
- IV. Guidelines:** Range*: 1-2 Years
- *For those cases resulting in custody

Advisory Information

V. Current Practice:

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

1. Theft

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)*</i> | <i>75th</i> | <i>90th**</i> |
|------------------------|-------------|-----------------------|-------------|---------------|
| Correctional Sentences | | | | |
| Project (s. 283, 294) | 1m | 3m | 5m | 1y |
| Sentencing Commission | | | | |
| (s. 294(a)) | | 4m | | 18m |

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.

** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for theft over \$1,000 during this period was 18 months (Sentencing Commission). This means that of all offenders who were convicted of theft over \$1,000 and who were sent to prison, 90% received terms of imprisonment that were 18 months or below.

2. Possession

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)</i> | <i>75th</i> | <i>90th</i> |
|---|-------------|----------------------|-------------|-------------|
| Correctional Sentences Project (s. 312, 313) | 1m | 3m | 6m | 1y |
| Sentencing Commission (s. 313(a)) | | 4m | | 2y |

3. False Pretence Over

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)</i> | <i>75th</i> | <i>90th</i> |
|---|-------------|----------------------|-------------|-------------|
| Correctional Sentences Project | n/a | n/a | n/a | n/a |
| Sentencing Commission (s. 320(2)(a)) | | 3m | | 2y |

4. Fraud Over

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)</i> | <i>75th</i> | <i>90th</i> |
|--|-------------|----------------------|-------------|-------------|
| Correctional Sentences Project (s. 338) | 1m | 3m | 1y | 18m |
| Sentencing Commission (s. 338(1)(a)) | | 6m | | 2y |

VI. Case Law: No clear principles emerged which were relevant to the entire group of offences.

Guideline Prototype

- I. **Offence:** Sexual Assault with a Weapon, Threats to a third Party or Causing Bodily Harm
s. 246.2, *Criminal Code*
- II. **Maximum:** 9 Years
- III. **Presumptive Disposition:** Presumption of Custody (IN)
- IV. **Guidelines:**

| <i>Offence</i> | <i>Description</i> | <i>Range</i> |
|-------------------------------------|--|--------------|
| Sexual Assault with a Weapon | Section 246.2 includes the elements of presence or use of a weapon, threats to cause bodily harm to a third person or causing bodily harm to the victim. | 2-4 yrs. |

Note: Although this offence is clearly related to s.246.3 and s.246.1, advisory information is only provided for s. 246.2

Advisory Information

V. **Current Practice:**

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 246.2, 246.2(a), 246.2(b), 246.2(c), 246.2(d)

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)*</i> | <i>75th</i> | <i>90th*</i> |
|--------------------------------|-------------|-----------------------|-------------|--------------|
| Correctional Sentences Project | 6m | 2.5y | 5y | 7y |
| Sentencing Commission | | 3y | | 8y |

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.

** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for sexual assault with a weapon during this period was 8 years (Sentencing Commission). This means that of all offenders who were convicted of sexual assault with a weapon *and* who were sent to prison, 90% received terms of imprisonment that were 8 years or below.

VI. Case Law:

1. Description:

- “In ascending order of seriousness, sexual assault (s.246.1), sexual assault with a weapon or by threats by a third person (s.246.2) and aggravated sexual assault (s.246.3) resemble the gradation of assault in s.245.

‘sexual assault’ includes an act which is intended to degrade or demean another person for sexual gratification.”

R. v. Taylor (1985), 36 Alta. L.R. (2d) 275 (Alta. C.A.)

- “One archetypical case of sexual assault is where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category, which we would describe as major sexual assault, includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, *fellatio*, *cunnilingus*, and bug-gery where the foreseeable major harm which we later describe more fully is present.”

“The starting point for a major sexual assault is 3 years assuming a mature accused with previous good character and no criminal record”.

(re: s. 246.1)

R. v. Sandercock (1986), 48 C.R. (3d) 154 (Alta. C.A.)

- “This section is a step up in severity to s. 245 and includes sexual assaults involving the actual use of a weapon or imitation thereof or the threat of the use of a weapon. (Actual possession of the weapon is not a condition precedent).” (re: s.246.2)

R. v. Kelly (1985), 37 C.R. (3d) 190 (B.C.C.A.)

2) Aggravating and Mitigating Factors

a) *Aggravating*:

- i) Pre-meditation:
 - where the attack is planned and deliberate, whether the offender has stalked his

- victim or chosen her at random. *R. v. Cardinal*, [1983] Alta. D. 7515-01
- ii) Degree of force:
- where the assault involved protracted forcible confinement or kidnapping. *R. v. Craig* (1975), 28 C.C.C. (2d) 311 (Alta. C.A.)
 - includes acts of horror or degradation. *R. v. Sweitzer* (1980), 26 A.R. 208 (Alta. C.A.)
- iii) Repeated acts:
- where there are repeated assaults or other acts of degradation. *R. v. Beauregard* (1983), 38 A.R. 350 (Alta. C.A.)
 - where a parent is engaged in intercourse with daughters over a period of many years and impregnated them. *Regina v. R.P.T. and Regina v. T.S.* (1984), 7 C.C.C. (3d) 109 (Alta. C.A.)
- iv) Location:
- where there is an invasion of the sanctity of the home. *R. v. Henry* (1983), 44 A.R. 242 (Alta. C.A.)
- v) Weapon:
- the display or use of weapon. *R. v. Sinitoski* (1983), 46 A.R. 206 (Alta. C.A.)
 - use of a gun. *F. v. R.* (1982), 2nd Alta. L.R. (2d) 90 (Alta C.A.)
- vi) Several offenders:
- where several offenders act together. *R. v. Brown and Murphy* (1982), 41 A.R. 69 (Alta. C.A.)
- vii) Characteristics of the victim:
- her age and whether she was a virgin. *R. v. Wilmott*, [1967] 1 C.C.C. 171 (Ont. C.A.)
- b) *Mitigating*
- i) Offender's good character:
- where there is a reduction in sentence length in recognition of the accused's previous good character. (Such a reduction can be rejected where there is a significant criminal record). *R. v. Hastings* (1985), 58 A.R. 108 (Alta. C.A.)

- ii) Guilty plea:
 - not only relevant to show remorse – accused should receive substantial recognition either for sparing the victim the need to testify or to wait to testify or for waiving some of his constitutional rights in deference to expeditious justice. *R. v. Sandercock* (1986), 48 C.R. (3d) 154 (Alta. C.A.)
- iii) Remorse:
 - offender shows remorse. *R. v. Henry* (1983), 44 A.R. 242 (Alta. C.A.)
- iv) Spontaneous offence:
 - the fact that an assault is totally spontaneous can offer mitigation, and sometimes drunkenness is a factor in determining whether the attack is spontaneous or whether the likely consequences were fully appreciated. *R. v. Sandercock* (1986), 48 C.R. (3d) 154 (Alta. C.A.)
- v) Provocation:
 - provocation of the offender by the victim is an obvious mitigating factor. *R. v. Sandercock* (1986), 48 C.R. (3d) 154 (Alta. C.A.)

Guideline Prototype

- I. Offence:** Break and Enter/
Dwelling-House*
s. 306(1)(d)
- II. Maximum:** 6 Years
- III. Presumptive Disposition:** Qualified Presumption of
Custody (QI) (i.e. unless it
is not a serious instance
of the offence *and* the offender
has no relevant record).
- IV. Guidelines:**

| <i>Offence</i> | <i>Description</i> | <i>Range*</i> |
|------------------------|--|---------------|
| Break and Enter | Breaking and entering a private dwelling and committing (or intending to commit) an indictable offence therein or breaking out of a private dwelling after having committed or intending to commit an indictable offence therein | 3-18 months |

* For those receiving custody

Advisory Information

V. Current Practice:

(These data reflect sentencing under the current system which includes full release or parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. to get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 306, 306(1), 306(1)(a), 306(1)(b), 306(1)(c), 306(1)(c)(i), 306(1)(c)(ii) (Includes break and enter of dwelling and non-dwelling):

Percentiles (m = months, y = years)

| Source | 25th | 50th (Median)* | 75th | 90th** |
|--|------|----------------|------|--------|
| Correctional Sentences Project (both dwelling and business premises) | 3m | 6m | 1y | 2y |
| Sentencing Commission (both dwelling and business premises) | | 6m | | 2y |

- * The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.
- ** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for break and enter during this period was 2 years (Sentencing Commission). This means that of all offenders who were convicted of break and enter *and* who were sent to prison, 90% received terms of imprisonment that were 2 years or below.

VI. Case Law:

1. Description:
 - No particular sub-categorization; variation as *per* aggravating and mitigating factors.
2. Aggravating and Mitigating Factors
 - a) *General*
 - i) Amount stolen:
 - the value of the goods stolen during the break and enter will aggravate or mitigate depending: *R. v. Prieduls* (Unreported) June 6, 1975 (Ont. C.A.)
R. v. Lemire (Unreported) June 8, 1977 (B.C.C.A.)
 - b) *Aggravating*
 - i) Series of offences:
 - where there is a string of offences. *R. v. Garcia and Silva*, [1970] 3 C.C.C. 124 (Ont. C.A.) N.B. where the number of offences is low and the accused is youthful, custody is to be avoided. *R. v. Dengo* (1972), 15 Crim. L.Q. 259 (Ont. C.A.)
 - ii) Premeditation:
 - where the offence is premeditated. *R. v. Murray* (1960), 32 W.W.R. 312 (Sask. C.A.)
 - iii) Criminal record:
 - where the offender has a criminal record - if the accused is a "professional burglar" this will justify a very serious penalty. *R. v. Brooks*, [1970] 4 C.C.C. 377 (Ont. C.A.)
 - c) *Mitigating*
 - i) Background of offender:
 - where the offender has no criminal record and has a good employment history and/or a supportive family. *R. v.*

Davenport (Unreported) February 17, 1977 (Ont. C.A.)

- where the offender has an unfortunate background or family history. *R. v. Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.)
- ii) Offender's alcoholism:
 - where the offender suffers from alcoholism and is trying to rehabilitate himself. *R. v. Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.)
- iii) Age:
 - where the offender is a youth. *R. v. Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.)
- iv) Desire for rehabilitation:
 - where the offender has a desire to be rehabilitated (and there are facilities available to assist in this). *R. v. Redstar* (1984), 34 Sask. R. 229 (Sask. C.A.)
 - where the offender has a criminal record but has "gone straight" for a period of time. *R. v. Murray* (1960), 32 W.W.R. 312 (Sask. C.A.)
- v) Mental Capacity:
 - where the offender is of borderline intelligence. *R. v. Lewis* (1985), 67 N.S.R. (2d) 198 (N.S.S.C.)
- vi) Spontaneous offence:
 - where there was only one offence and it was committed on impulse. *R. v. Murray* (1960), 32 W.W.R. 312 (Sask. C.A.)
- vii) Intoxicated:
 - where the offender was intoxicated when the offence was committed. *R. v. Ward* (1976), 14 N.S.R. (2d) 96 (N.S.S.C.)

Guideline Prototype (Stratified Offence)

- I. Offence:** Robbery
ss. 302/303, *Criminal Code*
- II. Maximum:** 9 Years
- III. Presumptive Disposition:** Presumption of Custody (IN)
- IV. Guidelines:**

| <i>Category</i> | <i>Description</i> | <i>Range</i> |
|-------------------------------------|--|--------------|
| Robbery I: (Aggravated) | Armed robbery of banks, merchants, private dwelling, with threats or use of violence | 2-4 Years |
| Robbery II: (Simplified) | Armed robbery of unprotected commercial outlets in the absence of actual physical harm to the victim; includes purse-snatching | 4-16 Months |

Advisory Information

V. Current Practice (All robberies combined)

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Criminal Code sections 302, 302(a), 302(b), 302(c), 302(d), 303

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)*</i> | <i>75th</i> | <i>90th**</i> |
|--------------------------------|-------------|-----------------------|-------------|---------------|
| Correctional Sentences Project | 1y | 2y | 3.5y | 6y |
| Sentencing Commission | | 2y | | 7y |

* The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.

** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for robbery during this period was 7 years (Sentencing Commission). This means that of all offenders who were convicted of robbery *and* who were sent to prison, 90% received terms of imprisonment that were 7 years or below.

VI. Case Law:

- Description:
 - “simple” robbery is: unsophisticated armed robbery of unprotected commercial outlets in the absence of actual physical harm to the victim and with modest success. *R. v. Johnas* (1983), 2 C.C.C. (3d) 490 (Alta. C.A.)

- “Armed robbery and robbery with violence require strongly deterrent sentences of imprisonment and that in the absence of exceptional mitigating circumstances such sentences should not be less than 3 years.” (re: Robbery I) *R. v. Owen* (1982), 50 N.S.R. (2d) 696 (N.S.S.C.)

2. Aggravating and Mitigating Factors

a) *General:*

- | | |
|-----------------------------|---|
| i) Locality of the offence: | <ul style="list-style-type: none"> • where a preliminary indication of the seriousness of the offence is whether it took place in a financial institution, a small commercial establishment, or a night depository. <i>R. v. Johnas</i> (1982), 32 C.R. (3d) 1 (Alta. C.A.) <i>R. v. Kurichh</i> (1983), 9 W.C.B. 138 (Alta. C.A.) |
| ii) Degree of violence: | <ul style="list-style-type: none"> • where a preliminary indication of the seriousness of the offence is the degree of violence or threat of violence used. <i>R. v. Johnas</i> (1982), 32 C.R. (3d) 1 (Alta. C.A.) |

b) *Aggravating:*

- | | |
|---------------------------|--|
| i) Use of weapon: | <ul style="list-style-type: none"> • use of firearm or possession of a loaded gun. <i>R. v. Johnas</i> (1982), 32 C.R. (3d) 1 (Alta. C.A.) • use of a weapon – even if it is inoperable, it is still a terrifying experience for the victim. <i>R. v. Hessam</i> (1983), 43 A.R. 247 (Alta. C.A.) • possession of any weapon, including an imitation. <i>R. v. Johnston</i> (1976), 18 Crim. L.Q. 286 (Ont. C.A.) |
| ii) Degree of violence: | <ul style="list-style-type: none"> • degree of actual physical violence or threat of violence. <i>R. v. Johnas</i> (1982), 32 C.R. (3d) 1 (Alta. C.A.) • where victim is seriously injured. <i>R. v. Miller and Couvreau</i> (1972), 8 C.C.C. (2nd) 97 (Man. C.A.) |
| iii) Character of victim: | <ul style="list-style-type: none"> • presence of vulnerable victim. <i>R. v. Johnas</i> (1982), 32 C.R. (3d) 1 (Alta. C.A.) • character of victim may aggravate but never mitigate. <i>R. v. Duval</i> (1970), 15 C.R.N.S. 140 (Que. C.A.) |

- iv) Criminal record:
 - where offender has a serious criminal record showing “confirmed criminality”. *R. v. McDonald* (1969), 12 C.R.N.S. 215 (Ont. C.A.)
- v) Premeditation:
 - degree of planning involved. *R. v. Johnas* (1982), 32 C.R. (3d) 1 (Alta. C.A.)
- vi) Amount stolen:
 - the greater the amount, the more serious the offence is thought to be. *R. v. Johnas* (1982), 32 C.R. (3d) 1 (Alta. C.A.)
- vii) Prevalence:
 - increased incidence of robbery is a proper factor to consider. *R. v. Mitchell* (1981), 23 C.R. (3d) 1 (N.S.S.C.)
- c) *Mitigating:*
 - i) Nature of record:
 - where offender’s long record includes no violence or penitentiary time. *R. v. Dummont and Dummont* (1970), 12 Crim. L.Q. 344 (Sask. C.A.)
 - where offender’s record is virtually clear of prior offences. *R. v. Hessam* (1983), 43 A.R. 247 (Alta. C.A.)
 - ii) Spontaneous offence:
 - where robbery was not planned or premeditated. *R. v. Johnas* (1982), 32 C.R. (3d) 1 (Alta. C.A.)
 - iii) Amount stolen:
 - where amount of take or its value is low. *R. v. Windsor et al.* (Unreported) December 30, 1976 (Ont. C.A.) *R. v. MacDonald et al.* (1973), 16 Crim. L.Q. 143 (Ont. C.A.)
 - iv) Youthful offender:
 - in some cases, extreme youth is a mitigating factor. *R. v. Casey* (1977), 20 Crim. L.Q. 145 (Ont. C.A.)
 - where a youthful offender is under the influence of an older accomplice. *R. v. Hessam* (1983), 43 A.R. 247 (Alta. C.A.)
 - v) Mental incompetence:
 - where offender is mildly retarded this may mitigate. *R. v. MacLaren* (1984), 62 N.S.R. (2d) 152 (N.S.S.C.)
 - where offender suffers from severe mental illness. *R. v. Thompson* (1983), 58 N.S.R. (2d) 21 (N.S.S.C.)

- vi) Assisting authorities:
 - where there is co-operation with the police, or a guilty plea. *R. v. Turner*; *R. v. Jurik* (1984), 50 A.C. 49 (Ont. C.A.)
- vii) Guilty plea:
 - where offender pleads guilty at first opportunity. *R. v. Hessam* (1983), 43 A.R. 247 (Alta. C.A.)
- viii) Remorse:
 - remorse is generally a mitigating factor. *R. v. Johnas* (1982), 32 C.R. (3d) 1 (Alta. C.A.)

Guideline Prototype (Stratified Offence)

- I. Offence:** Trafficking; Possession for Purpose of Trafficking
s. 4, *Narcotic Control Act*
- II. Maximum:** 12 Years
- III. Presumptive Disposition:** Presumption of Custody (IN)

IV. Guidelines:

| <i>Category</i> | <i>Description</i> | <i>Range</i> |
|-------------------------------|--|--------------|
| Trafficking I (Major) | Large-scale commercial: large-scale distribution or wholesaling or possession of large quantities for that purpose | 2-4 Years |
| Trafficking II (Minor) | Petty retailing: peddling of small quantities, isolated sales or transfers or possession for that purpose | 1-6 Months |

Advisory Information

V. Current Practice

(These data reflect sentencing under the current system which includes full release on parole as early as one-third and remission based release after an inmate has served two-thirds of sentence. To get an idea of time actually served by inmates, these sentences must be discounted to a greater degree than would the ranges proposed by the Commission).

Narcotic Control Act sub-sections 4, 4(1), 4(2), 4(3)

Percentiles (m = months, y = years)

| <i>Source</i> | <i>25th</i> | <i>50th (Median)*</i> | <i>75th</i> | <i>90th**</i> |
|--------------------------------|-------------|-----------------------|-------------|---------------|
| Correctional Sentences Project | 1m | 3m | 1y | 3.5y |
| Sentencing Commission | | 3m | | 2y |

- * The median sentence can be regarded as the sentence in the middle of the distribution: of all cases resulting in custody, half are above (i.e. higher) and half are below it.
- ** The 90th percentile is that sentence below which 90% of cases can be found. To illustrate, the 90th percentile for trafficking during this period was 2 years (Sentencing Commission). This means that of all offenders who were convicted of trafficking *and* who were sent to prison, 90% received terms of imprisonment that were 2 years or below.

VI. Case Law:

1. Description:

a) *General:*

Where three categories of trafficking are suggested:

- i) large-scale commercial distribution or wholesaling or possession of large quantities for that purpose
- ii) petty retailing or peddling of small quantities or possession for that purpose
- iii) isolated sales or transfers in a social setting by youthful offenders.

R. v. Fifield (1978), 5 C.R. (3d) S-9 (N.S.C.A.) *R. v. Longueay* (1978), 3 C.R. (3d) S-29 (N.S.C.A.)

b) *Ranges:*

i) large scale commercial operation:

7 years imprisonment for \$2,000,000 worth. *Carr and Robson v. The Queen* (1976), 15 N.S.R.(2d) 465 (N.S.S.C.).

5 years imprisonment for \$3,000,000 worth of hashish (1,700 pounds). *R. v. Erven* (1977), 21 N.S.R.(2d) 654 (N.S.S.C.).

2 years imprisonment for marijuana (8 pounds). *R. v. Eustace* (1977), 23 N.S.R. (2d) 524 (N.S.S.C.).

3 years imprisonment for \$40,000 worth of hashish (20 pounds). *R. v. James* (1978), 24 N.S.R. (2d) 423 (N.S.S.C.).

ii) petty retailer:

12 months imprisonment for hashish (approximately 1 1/3 pounds in packages) – 24 years old student. *Spencer v. The Queen* (1973), 6 N.S.R. (2d) 555 (N.S.S.C.).

60 days intermittent imprisonment for possession of thirteen 1 ounce packages – 18 years old. *R. v. Stuart* (1975), 24 C.C.C. (2d) 370 (N.S.C.A.).

4 months imprisonment for hashish (3/4 pound) – 22 years old with a good record. *Baker v. The Queen* (1977), 17 N.S.R. (2d) 239 (N.S.S.C.).

90 days intermittent imprisonment for marijuana (approximately 1 pound). *McLaughlan v. The Queen* (1977), 17 N.S.R. (2d) 604 (N.S.C.A.).

iii) social sale or transfer:

2 and 4 months imprisonment for two small sales of marijuana – 19 years old. *R. v. MacArthur* (1975), 9 N.S.R.(2d) 353 (N.S.S.C.).

90 days intermittent imprisonment for marijuana (approximately 1 ounce). *R. v. Eisan* (1975), 12 N.S.R. (2d) 34 (N.S.S.C.)

6 months imprisonment for hashish (4 capsules) – 20 years old with a prior record. *R. v. Fitzgerald* (1976), 14 N.S.R. (2d) 638 (N.S.S.C.)

suspended sentence for hashish \$5.00 worth – 19 years old. *R. v. McLay* (1977), 17 N.S.R. (2d) 135 (N.S.C.A.)

Note:

Categories two (petty retailing), and three (social sale) are similar both in nature and proposed range and have been collapsed into one category for the purposes of this guideline sheet. The major distinction in trafficking cases in both the case law and current practice is between large-scale commercial ventures on the one hand and petty retailing (where a social sale represents the least serious type of petty retailing) on the other.

2. Aggravating and Mitigating Factors

a) *General:*

i) Type of drug:

- major factor in determining the seriousness of the offence: *Canadian Sentencing Handbook* (pp. 65-87) drug offences are discussed under the headings: marijuana, heroine, morphine, cocaine, LSD, P.C.P., amphetamines.
- as for the relative seriousness of the types of drugs, cocaine is considered slightly more dangerous than marijuana and hashish but much less so than heroine and alcohol. *R. v. Libby* (1986), 23 C.R. (3d) 10 (Que. C.S.P.)
- even though heroine is considered to be one of the “worst” types of narcotics, the type of drug is not enough to make it a

- “worst case” demanding the maximum penalty. Other factors must be considered. *R. v. Ko* (1980), 11 C.R. (3d) 298 (B.C.C.A.)
- ii) Type of venture:
 - size of the operation – big stakes in a very dangerous business attract big gains and require an equally imposing penalty. *R. v. Ponak and Gunn* (1973), 11 C.C.C. (2d) 346 (B.C.C.A.)
 - possession of weapon is not in itself an aggravating factor but may be evidence of premeditation or a sophisticated organizational network. *R. v. Bosley and Duarte*, [1970] 1 C.C.C. 328 (Ont. C.A.)
 - iii) Amount of drug:
 - as indicating the nature of the distribution network. *R. v. McLay* (1977), 17 N.S.R. (2d) 135 (N.S.C.A.).
 - iv) Role of accused:
 - accused’s position in the hierarchy (if any), frequency of accused’s sales, number of people involved. *R. v. McLay* (1977), 17 N.S.R. (2d) 135 (N.S.C.A.)
- b) *Aggravating:*
- i) Major role of offender:
 - as part of a “major trafficking equation”. *R. v. Ponak and Gunn* (1973), 11 C.C.C. (2d) 346 (B.C.C.A.)
 - ii) Profit motive:
 - where the offender is an entrepreneur who traffics drugs strictly for profit. *R. v. Pearce* (1974), 16 C.C.C. (2d) 369 (Ont. C.A.)
 - consider also the value of drug as evidence of desire to secure large profits. *R. v. Ponak and Gunn* (1973), 11 C.C.C. (2d) 346 (B.C.C.A.)
 - iii) Previous criminal record:
 - particularly relevant if prior drug offences. *R. v. Babiak* (1975), 21 C.C.C. (2d) 464 (Man. C.A.)
 - iv) Nature of drug:
 - where the drug is “destructive to the life of the purchaser” (i.e. more serious than hashish and marijuana). *R. v. Di Giovanni* (1977), 10 C.C.C. (2d) 392 (Ont. C.A.)
 - v) Teenage buyers:
 - sales or attempted sales to teenage buyers highlights the “vicious” consequences

- of the drug trade. *R v. Salamon* (1972), 6 C.C.C. (2d) 165 (Ont. C.A.)
- vi) Position of trust:
- physicians in positions of trust – abuse of physician/patient relationship motivated by profit. *R. v. Burke* (1978), 16 Nfld. and P.E.I.R. 132 (P.E.I.C.A.)
- c) *Mitigating:*
- i) Possibility of rehabilitation:
- in cases where the offender is a drug addict and may be rehabilitated. *R. v. Marcello* (1973), 11 C.C.C. (2d) 302 (Ont. C.A.)
 - responding well to treatment. *R. v. Wright*, [1976] 12 O.R. 8 (Ont. C.A.)
 - offender is a small-time pusher and user and shows post-arrest progress towards rehabilitation (e.g., desire to find a job and abandon the drug culture), court will be reluctant to impose a custodial term. *R. v. Longeuay* (1979), 3 C.R. (3d) S-29 (N.S.C.A.)
- ii) Offender's background:
- where offender has a good reputation and a steady job. *R. v. Libby* (1980), 23 C.R. (3d) 10 (Que. C.S.P.)
 - youthfulness of the accused, apparent desire to reform, education records – usually in minor types of trafficking. *R. v. McLay* (1977), 17 N.S.R. (2d) 135 (N.S.C.A.)
 - where sales were part of a large scale operation, the court will not be impressed by the fact that the accused used his good reputation as a shield. *R. v. Kotrbaty* (1978), 5 C.R. (3d) S-13 (B.C.S.C.)
- iii) External influences:
- where but for the insistence of the undercover officer the accused would probably not have become involved in dealing cocaine. *R. v. Murphy* (1983), 44 Nfld. and P.E.I.R. 243 (P.E.I.C.A.)
- iv) Nature of drug:
- where substance sold wasn't the hard drug it was represented to be. *R. v. Masters* (1974), 15 C.C.C. (2d) 142 (Ont. C.A.)

- v) Financial need:
 - where economic pressures prompt involvement, rather than simple greed. *R. v. Bruckshaw* (1973), 9 C.C.C. (2d) 133 (B.C.C.A.)
- vi) Remorse:
 - lack of remorse cannot be used in order to increase a sentence but only as a reason for not extending a degree of leniency. *R. v. Campbell* (1977), 18 N.S.R. (2d) 547 (N.S.C.A.)
- vii) Absence of criminal record:
 - absence of previous convictions will not count as a mitigating factor of any significant value where the offender was involved in a relatively large-scale operation. *R. v. Kotrbaty* (1978), 5 C.R. (3d) S-13 (B.C.S.C.)
- viii) Assisting the authorities:
 - co-operation with the authorities in providing evidence against other accused is a factor. *R. v. Wong and Man* (1986), B.C. Decisions, Sentencing, 7400-01 (B.C.C.A.)

Appendix G

Explanation of the Qualified Presumptions

This appendix explains a critical component of the intermediate categories of presumption. Recall from the discussion in Chapter 11 that an offender convicted of a *qualified in* offence is incarcerated unless the offence is not serious (i.e., less serious than most instances of this crime) *AND* the offender has no relevant criminal record. The reader may ask why the conjunction “and” is used, rather than the disjunction “or”? There is an important logical reason why it cannot be “or”. This will become clear by considering the following:

There are four possible outcomes, that is, the offence can be serious/or not and the offender can have a record/or not. This gives rise to the following four possibilities.

Table 1

Presumption: QUALIFIED IN

(First interpretation: AND)

| | |
|--|-----|
| 1. Offence is a serious instance; offender has relevant record | IN |
| 2. Offence is a serious instance; offender has no relevant record | IN |
| 3. Offence not a serious instance; offender has relevant record | IN |
| 4. Offence not a serious instance; offender has no relevant record | OUT |

It is obvious that all cases have to fall in one of these 4 categories: the offence is either serious or not and the offender either has or does not have a criminal record.

Now let’s examine the presumptive dispositions. If we use “and”, then for 3 out of the 4 conditions the presumption is IN. (See Table 1). This is what one would expect from a presumptive IN disposition.

What happens if the “and” becomes an “or”? It will be seen that this change does not just decrease the number of offenders who get imprisonment, it changes the whole presumption. In fact it turns an “IN unless” into an “OUT unless”.

Reading the wording, this time inserting an “or” instead of an “and”, will make this clear.

An offender convicted of a “qualified in” offence is incarcerated unless the offence is not serious *OR* the offender has no relevant record. The four logical possibilities are the same, but the presumptions change.

Table 2

Presumption: QUALIFIED IN

(Second interpretation: OR)

| | |
|--|-----|
| 1. Offence is a serious instance; offender has relevant record | IN |
| 2. Offence is a serious instance; offender has no relevant record | OUT |
| 3. Offence not a serious instance; offender has relevant record | OUT |
| 4. Offence not a serious instance; offender has no relevant record | OUT |

So the definition has to employ “and”, not “or”, for otherwise the presumed “IN” becomes a presumed “OUT”.

Also, in describing qualified “OUT” offences, the word must be “and”, not “or” as the qualified “OUT” also reverses, and becomes a presumed “IN”. (i.e. 3/4 of cases are “OUT” using an “and”; 3/4 are “IN”, using an “or”).

On pages 313-315 of Chapter 11, we describe in words the eight possible outcomes that may result from the use of a qualified presumption of non-custody (a qualified “OUT”). It would also appear useful to provide the same information in the form of a diagram. We shall provide a diagram for the qualified “IN” and for the qualified “OUT”.

Table 3

Compliance and Departure Outcomes for a Qualified Presumption of Custody

Presumption: QUALIFIED IN

| <i>Case</i> | <i>Sentence</i> | <i>Outcome</i> |
|---|-------------------|----------------|
| 1. Offence is a serious instance; offender has relevant record | Custody (IN) | Compliance |
| 2. Offence is not a serious instance; offender has no relevant record | Non-Custody (OUT) | Compliance |
| 3. Offence is not a serious instance; offender has relevant record | Custody (IN) | Compliance |
| 4. Offence is a serious instance; offender has no relevant record | Custody (IN) | Compliance |
| 5. Offence is a serious instance; offender has a relevant record | Non-Custody (OUT) | Departure |
| 6. Offence is not a serious instance; offender has no relevant record | Custody (IN) | Departure |
| 7. Offence is not a serious instance; offender has relevant record | Non-Custody (OUT) | Departure |
| 8. Offence is a serious instance; offender has no relevant record | Non-Custody (OUT) | Departure |

Table 4

Compliance and Departure Outcomes for a Qualified Presumption of Non-Custody

Presumption: QUALIFIED OUT

| <i>Case</i> | <i>Sentence</i> | <i>Outcome</i> |
|---|-------------------|----------------|
| 1. Offence is not a serious instance; offender has no relevant record | Non-Custody (OUT) | Compliance |
| 2. Offence is a serious instance; offender has a relevant record | Custody (IN) | Compliance |
| 3. Offence is a serious instance; offender has no relevant record | Non-Custody (OUT) | Compliance |
| 4. Offence is not a serious instance; offender has a relevant record | Non-Custody (OUT) | Compliance |
| 5. Offence is not a serious instance; offender has no relevant record | Custody (IN) | Departure |
| 6. Offence is a serious instance; offender has a relevant record | Non-Custody (OUT) | Departure |
| 7. Offence is a serious instance; offender has no relevant record | Custody (IN) | Departure |
| 8. Offence is not a serious instance; offender has relevant record | Custody (IN) | Departure |

Appendix H

Criminal Law Reform Act, 1984; (Bill C-19) Proposed Conditions of Probation

(Sections 662 and 663)

662. (1) Where an offender is convicted of an offence, the court may direct that the offender comply with the conditions prescribed in a probation order in accordance with section 663.
- (2) Where a court imposes a term of imprisonment on an offender, the court shall not make a direction under subsection (1), unless the term of imprisonment is less than two years.
663. (1) The following conditions shall be deemed to be prescribed in a probation order; namely, that the offender shall
- (a) keep the peace and be of a good behaviour;
 - (b) appear before the court when required to do so by the court; and
 - (c) report to and be under the supervision of a probation officer or some other person designated by the court.
- (2) The court may, in addition to the conditions referred to in subsection (1), prescribe as conditions in a probation order that the offender shall do any one or more of the following things specified in the order; namely,
- (a) refrain from residing or being in a designated place;
 - (b) provide for the support of his spouse or any other dependants whom he is liable to support;
 - (c) submit to treatment for alcohol or drug abuse if the court is satisfied that the offender is in need of treatment and is a suitable candidate for treatment;
 - (d) abstain from owning, possessing or carrying a weapon;

- (e) make restitution to any other person for any loss, damage or injury suffered by that person in respect of which an order under section 665 or 666 may be made;
- (f) remain within the jurisdiction of the court and notify, in writing, the court or the probation officer or any other person designated by the court of any change in his address or his employment or occupation prior to such change;
- (g) make reasonable efforts to find and maintain suitable employment or to attend educational or training programs;
- (h) attend a program of driver education or improvement:
 - (i) in the province in which the probation order was made, or
 - (ii) in the province in which the offender resides,

if the court is satisfied that the offender would benefit from such a program; and

- (i) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the offender and for preventing a repetition by him of the same offence or the commission of other offences.

(3) Where a court prescribes a condition in a probation order under paragraph (2)(i), the court shall:

- (a) provide the reasons why such a condition is considered desirable; and
- (b) enter the reason in the record of the proceedings, or where the proceedings are not recorded, provide written reasons.

(4) A probation order shall be in writing and may be in Form 44 and the court that makes the probation order shall specify therein the period for which it is to remain in force.

(5) A probation order comes into force

- (a) on the date on which the order is made; or
- (b) where the offender is sentenced to imprisonment, on his release from custody.

(6) Subject to paragraph 668.17(5)(c), no probation order shall continue in force for more than three years from the date on which the order comes into force.

(7) Where an offender who is bound by a probation order is imprisoned prior to the expiration of the order, the order continues in force except in so far as the term of imprisonment renders it impossible for the offender for the time being to comply with the order.

Appendix I

Excerpt from *An Act to Amend the Parole Act and the Penitentiary Act* as passed by the House of Commons, June 26, 1986

(Section 15.3)

- s.15.3 (1) The Commissioner shall cause to be reviewed by the Service the case of an inmate, before the presumptive release date of the inmate, where the inmate is serving a term of imprisonment that includes a sentence imposed in respect of an offence mentioned in the schedule that had been prosecuted by indictment.

Schedule

1. An offence under any of the following provisions of the *Criminal Code*:
 - (a) paragraph 79(2)(a) (causing injury with intent);
 - (b) section 83 (use of firearm during commission of offence);
 - (c) subsection 84(1) (pointing a firearm);
 - (d) section 132 (prison breach);
 - (e) section 219 (manslaughter);
 - (f) section 222 (attempt to commit murder);
 - (g) section 228 (causing bodily harm with intent);
 - (h) section 230 (overcoming resistance to commission of offence);
 - (i) section 245 (assault);

- (j) section 245.1 (assault with a weapon or causing bodily harm);
 - (k) section 245.2 (aggravated assault);
 - (l) section 245.3 (unlawfully causing bodily harm);
 - (m) section 246 (assaulting a peace officer);
 - (n) section 246.1 (sexual assault);
 - (o) section 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm);
 - (p) section 246.3 (aggravated sexual assault);
 - (q) section 247 (kidnapping);
 - (r) section 303 (robbery);
 - (s) section 389 (arson);
 - (t) section 390 (setting fire to other substance);
 - (u) section 392 (setting fire by negligence);
 - (v) paragraph 423(1)(a) (conspiracy to commit murder);
2. An offence under any of the following sections of the *Criminal Code*, as they read immediately before January 4, 1983:
- (a) section 144 (rape);
 - (b) section 145 (attempt to commit rape);
 - (c) section 149 (indecent assault on female);
 - (d) section 156 (indecent assault on male);
 - (e) section 245 (common assault); and
 - (f) section 246 (assault with intent).

Appendix J

An Example of a Sentencing Grid

This appendix contains an example of a sentencing guidelines grid. It is drawn from the three year evaluation report of the Minnesota Guidelines Commission published in 1984. It is a two-dimensional grid. The vertical dimension indicates the seriousness level of the offence of conviction. The horizontal dimension indicates the offender's criminal record score. The dark line across the grid is referred to as the *dispositional* line. All cases falling in cells *below* the line receive sentences of imprisonment. Cases falling in cells *above* the dispositional line receive stayed sentences, or non-imprisonment. The single number in the cells above the line (and this is sometimes a source of confusion) indicates the length of the sentence that should be "stayed". For cases falling in cells below the line, any sentence within the ranges shown in the cell can be imposed without the sentence being a departure from the sentencing guidelines. Thus, for example, an offender convicted of aggravated robbery with a criminal history score of "4", could receive a sentence of between 60 and 70 months without the sentence being a departure from the guidelines. For further information upon the use of a sentencing guidelines grid, and its impact upon sentencing practice in that state, the reader is referred to Minnesota Guidelines Commission, 1984 and related publications.

Minnesota Sentencing Guidelines Grid

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

Offenders with non-imprisonment felony sentences may be subject to jail time according to law.

CRIMINAL HISTORY SCORE

| SEVERITY LEVELS OF CONVICTION OFFENSE | | 0 | 1 | 2 | 3 | 4 | 5 | 6 or more |
|--|-------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| <i>Unauthorized Use of Motor Vehicle</i> <i>Possession of Marijuana</i> | I | 12* | 12* | 12* | 13 | 15 | 17 | 19 18-20 |
| <i>Theft Related Crimes (\$250-\$2500)</i> <i>Aggravated Forgery (\$250-\$2500)</i> | II | 12* | 12* | 13 | 15 | 17 | 19 | 21 20-22 |
| <i>Theft Crimes (\$250-\$2500)</i> | III | 12* | 13 | 15 | 17 | 19 18-20 | 22 21-23 | 25 24-26 |
| <i>Nonresidential Burglary</i> <i>Theft Crimes (over \$2500)</i> | IV | 12* | 15 | 18 | 21 | 25 24-26 | 32 30-34 | 41 37-45 |
| <i>Residential Burglary</i> <i>Simple Robbery</i> | V | 18 | 23 | 27 | 30 29-31 | 38 36-40 | 46 43-49 | 54 50-58 |
| <i>Criminal Sexual Conduct 2nd Degree (a) & (b) Intrafamilial Sexual Abuse 2nd Degree subd. 1(1)</i> | VI | 21 | 26 | 30 | 34 33-35 | 44 42-46 | 54 50-58 | 65 60-70 |
| <i>Aggravated Robbery</i> | VII | 24 23-25 | 32 30-34 | 41 38-44 | 49 45-53 | 65 60-70 | 81 75-87 | 97 90-104 |
| <i>Criminal Sexual Conduct 1st Degree</i> <i>Assault, 1st Degree</i> | VIII | 43 41-45 | 54 50-58 | 65 60-70 | 76 71-81 | 95 89-101 | 113 106-120 | 132 124-140 |
| <i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree (felony murder)</i> | IX | 105 102-108 | 119 116-122 | 127 124-130 | 149 143-155 | 176 168-184 | 205 195-215 | 230 218-242 |
| <i>Murder, 2nd Degree (with intent)</i> | X | 120 116-124 | 140 133-147 | 162 153-171 | 203 192-214 | 243 231-255 | 284 270-298 | 324 309-339 |

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

☒ At the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation.

☐ Presumptive commitment to state imprisonment.

* One year and one day

Appendix K

Complete List of Recommendations

Chapter 6

- 6.1 The Commission recommends that the fundamental purpose of sentencing be formulated thus: It is recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.
- 6.2 The Commission recommends the following Declaration of Purpose and Principles of Sentencing be adopted by Parliament for inclusion in the *Criminal Code*:

Declaration of Purpose and Principles of Sentencing

1. *Definitions*

“Sentencing” is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.

“Sanction” includes an order or direction made under subsection 662.1(1) (absolute or conditional discharge); subsection 663(1)(a) (suspended sentence and probation); subsection 663(1)(b) (probation with imprisonment or fine); sections 653 and 654 (restitution); subsections 646(1) and (2), section 647 and subsection 722(1) (fine); subsections 160(4), 281.2(4), 352(2) and 359(2) (forfeiture); subsections 98(2) and 242(1) and (2) (prohibition); subsection 663(1)(c) (intermittent term of imprisonment); and a term of imprisonment.

(Note: The definition of sanction is intended to include all sentencing alternatives provided for in the *Criminal Code*. Section numbers refer to *Code* provisions as they currently exist).

2. *Overall Purpose of the Criminal Law*

It is hereby recognized and declared that the enjoyment of peace and security are necessary values of life in society and consistent therewith, the overall purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society.

3. *Fundamental Purpose of Sentencing*

It is further recognized and declared that in a free and democratic society peace and security can only be enjoyed through the due application of the principles of fundamental justice. In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

4. *Principles of Sentencing*

Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:

- a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.
- b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.
- c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
 - i) any relevant aggravating and mitigating circumstances;

- ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
- iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;
- iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
- v) a term of imprisonment should be imposed only:
 - aa) to protect the public from crimes of violence,
 - bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,
 - cc) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.
- d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:
 - i) denouncing blameworthy behaviour;
 - ii) deterring the offender and other persons from committing offences;
 - iii) separating offenders from society, where necessary;
 - iv) providing for redress for the harm done to individual victims or to the community;
 - v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

Chapter 8

- 8.1 The Commission recommends the abolition of mandatory minimum penalties (fines and periods of incarceration), for all offences except murder and high treason.
- 8.2 The Commission recommends that mandatory prohibition orders be further studied in light of the proposed sentencing framework.

Chapter 9

- 9.1 For offences other than murder and high treason, the Commission recommends that the current penalty structure be repealed and replaced by the following penalty structure:

12 years
9 years
6 years
3 years
1 year
6 months

- 9.2 The Commission recommends that hybrid offences be abolished and reclassified as offences carrying a single maximum penalty of 6 months, 1 year, 3 years, 6 years, 9 years or 12 years imprisonment.
- 9.3 The Commission recommends that the dangerous offender provisions in the *Criminal Code* be repealed.
- 9.4 The Commission recommends that, according to explicit criteria, the court be given the power to impose an exceptional sentence exceeding the maximum sentence for specified offences by up to 50%, following the procedure specified in this report.
- 9.5 The Commission recommends that the use of consecutive and concurrent sentences for multiple offence sentencing be replaced by the use of the total sentence.
- 9.6 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.17(10) of the Criminal Law Reform Act, 1984 (Bill C-19).
- 9.7 The Commission recommends the introduction of a provision in the *Criminal Code* similar to that proposed in subsection 668.24(a) of the Criminal Law Reform Act, 1984 (Bill C-19).

Chapter 10

- 10.1 The Commission recommends the abolition of full parole, except in the case of sentences of life imprisonment.
- 10.2 The Commission recommends that earned remission be retained by way of credits awarded for good behaviour which may reduce by up to one-quarter the custodial portion of the sentence imposed by the judge.
- 10.3 The Commission recommends that all offenders be released without conditions unless the judge, upon imposing a sentence of incarceration, specifies that the offender should be released on conditions.

- 10.4 The Commission recommends that a judge may indicate certain conditions but the releasing authority shall retain the power to specify the exact nature of those conditions, modify or delete them or add other conditions.
- 10.5 The Commission recommends that the nature of the conditions be limited to explicit criteria with a provision that if the judge or the releasing authority wishes to prescribe an “additional” condition, they must provide reasons why such a condition is desirable and enter the reasons on the record.
- 10.6 The Commission recommends that where an offender, while on remission-based release, commits a further offence or breaches a condition of release, he or she shall be charged with an offence of violating a condition of release, subject to a maximum penalty of one year..
- 10.7 The Commission recommends that voluntary assistance programs be developed and made available to all inmates prior to and upon release from custody to assist them in their re-integration into the community.
- 10.8 The Commission recommends that a Sentence Administration Board be given the power to withhold remission release according to the criteria specified in the recently enacted legislation: *An Act to Amend the Parole Act and the Penitentiary Act*.
- 10.9 The Commission recommends that all inmates be eligible to participate in a day release program after serving two-thirds of their sentence, with the exception of those who meet the criteria for withholding remission release.
- 10.10 The Commission recommends that the granting of special leave according to explicit criteria remain at the discretion of the prison administration. Inmates shall be eligible for special leave passes immediately upon being placed in custody.
- 10.11 The Commission recommends that parole by exception be abolished and that cases where the inmate is terminally ill or where the inmate’s physical or mental health is likely to suffer serious damage if he or she continues to be held in confinement shall be dealt with by way of the Royal Prerogative of Mercy.
- 10.12 The Commission recommends that the Sentence Administration Board should conduct the necessary review and forward submissions regarding clemency to the Solicitor General.
- 10.13 The Commission recommends that Canadian immigration law should be amended to provide the necessary authority for the deportation of convicted offenders in specified circumstances.
- 10.14 The Commission recommends that where a judge imposes a custodial sanction, he or she may recommend the nature of the custody imposed.

- 10.15 The Commission further recommends that federal and provincial governments provide the necessary resources and financial support for the establishment and maintenance of open custody facilities.
- 10.16 The Commission recommends that the mandatory life imprisonment sentence be retained for first and second degree murder and high treason.
- 10.17 The Commission recommends that inmates serving sentences for first degree murder or high treason be eligible for release on conditions after serving a minimum of 15 years up to a maximum of 25 years in custody. The court would set the date of eligibility for release within that limit.
- 10.18 The Commission recommends that inmates serving a life sentence for second degree murder be eligible for release on conditions after serving a minimum of ten years, and a maximum of 15 years in custody. The court would set the date of eligibility for release within that limit.
- 10.19 The Commission recommends that at the eligibility date, the inmate have the burden of demonstrating his or her readiness for release on conditions for the remainder of the life sentence.
- 10.20 The Commission recommends that the ineligibility period set by the court be subject to appeal.

Chapter 11

- 11.1 The Commission recommends that written reasons be provided every time the judge imposes a sentence which departs from the sentencing guidelines.
- 11.2 The Commission recommends that a sentence, whether it is within the sentencing guidelines or departs from them, can be appealed either by the defendant or the Crown prosecutor.
- 11.3 The Commission recommends that the sentencing guidelines should be tabled in the House of Commons by the Minister of Justice within 15 days of their receipt and would come into effect at the expiry of 90 days unless rejected by negative resolution of the House of Commons. In order to be considered, such a resolution would have to be presented by a minimum of 20 members of the House.
- 11.4 The Commission recommends that the *Statutory Instrument Act* be amended specifically to exclude the national sentencing guidelines from the application of the Act.
- 11.5 The Commission recommends that four presumptions be used to provide guidance for the imposition of custodial and non-custodial sentences:

- unqualified presumptive disposition of custody
- unqualified presumptive disposition of non-custody
- qualified presumptive disposition of custody
- qualified presumptive disposition of non-custody.

- 11.6 The Commission recommends that the presumptive dispositions assigned by the Canadian Sentencing Commission to the offences defined in the *Criminal Code*, the *Narcotic Control Act* and the *Food and Drugs Act* (Parts III, IV) be adopted as national sentencing guidelines for Canada.
- 11.7 The Commission recommends that the guideline prototypes that it has developed be adopted as providing the basis for the formulation of a complete set of national numerical sentencing guidelines for Canada.
- 11.8 The Commission recommends that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

Aggravating Factors

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
2. Existence of previous convictions.
3. Manifestation of excessive cruelty towards victim.
4. Vulnerability of the victim due, for example, to age or infirmity.
5. Evidence that a victim's access to the judicial process was impeded.
6. Existence of multiple victims or multiple incidents.
7. Existence of substantial economic loss.
8. Evidence of breach of trust (e.g., embezzlement by bank officer).
9. Evidence of planned or organized criminal activity.

Mitigating Factors

1. Absence of previous convictions.
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.

4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by offender.
7. Evidence that the offender played a relatively minor role in the offence.

- 11.9 In order to facilitate the process of providing explicit justification for departing from the guidelines, the Commission recommends that the following principles respecting the use of aggravating and mitigating factors be incorporated to the sentencing guidelines:

Identification: when invoking aggravating and mitigating factors, the sentencing judge should identify which factors are considered to be mitigating and which factors are considered to be aggravating.

Consistency: when invoking a particular factor, the judge should identify which aspect of the factor has led to its application in aggravation or mitigation of sentence. (For example, rather than merely referring to the age of the offender, the judge should indicate that it was the offender's *youth* which was considered to be a mitigating factor or the offender's *maturity* which was considered to be an aggravating factor. This would prevent the inconsistent use of age as an aggravating factor in one situation and as a mitigating factor in a comparable situation.)

Specificity: the personal circumstances or characteristics of an offender should be considered as an aggravating factor only when they relate directly to the commission of the offence. (For example, a judge might consider an offender's expertise in computers as an aggravating factor in a computer fraud case but the above principles would preclude the court from considering the lack of education of a convicted robber as an aggravating circumstance.)

Legal rights: the offender's exercise of his legal rights should never be considered as an aggravating factor.

- 11.10 The Commission recommends that time spent in custody before the sentence is imposed should count towards any sentence of imprisonment imposed following conviction. This time shall be credited on a one-to-one ratio with time served after conviction. An offender may earn remission upon time served prior to sentencing.
- 11.11 The Commission recommends the establishment of a Judicial Advisory Committee which would act in an advisory capacity to the permanent sentencing commission, in the formulation of amendments to the original sentencing guidelines to be submitted to Parliament. Furthermore, the membership of the Judicial Advisory Committee should be composed of a majority of trial court judges from all levels of courts in Canada.

- 11.12 The Commission recommends that the *Criminal Code* be amended to grant explicitly to the Courts of Appeal the power to make sentencing policy and, for substantial and compelling reasons to amend the presumptive custodial ranges determined by this Commission and by its successor, the permanent sentencing commission.

Chapter 12

- 12.1 The Commission recommends that the federal and provincial governments provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use.
- 12.2 The Commission recommends the development of mechanisms to provide better information about sentencing objectives to sentence administrators.
- 12.3 The Commission recommends that a transcript of the sentencing judgment be made available to the authorities involved in the administration of the sentence.
- 12.4 The Commission recommends that court officials, corrections personnel and other sentence administrators meet and discuss the parameters of authority in criminal justice administration, sentencing objectives and other issues in sentencing.
- 12.5 The Commission recommends the development of mechanisms to provide better information about alternative sentencing resources to the judiciary.
- 12.6 The Commission recommends that feedback to the courts regarding the effectiveness of sanctions be provided on a systematic basis.
- 12.7 The Commission recommends that prior to imposing a particular community sanction, the sentencing judge be advised to consult or obtain a report respecting the suitability of the offender for the sanction and the availability of programs to support such a disposition.
- 12.8 The Commission endorses the general policy in the Criminal Law Reform Act, 1984 (former Bill C-19) that community sanctions be developed as independent sanctions. The Commission recommends that the federal government enact legislation which reflects the sentencing proposals in the Criminal Law Reform Act, 1984 (Bill C-19). The Commission further recommends that additional proposals be examined by the permanent sentencing commission and by the federal and/or provincial governments for further review, development and implementation.
- 12.9 The Commission recommends that community sanctions be defined and applied as sanctions in their own right.

- 12.10 The Commission recommends that specific guidance be developed, either by the permanent sentencing commission or by a body specifically mandated to study this issue, respecting when particular community sanctions should be imposed.
- 12.11 The Commission recommends that the permanent sentencing commission consider the feasibility of developing criteria and principles which permit the comparison of individual community sanctions and which attempt to standardize their use (e.g., X dollars is the equivalent of Y hours of community service).
- 12.12 The Commission recommends that the judiciary retain primary control over the nature and conditions attached to community sanctions.
- 12.13 The Commission recommends that the permanent sentencing commission include in its review of community sanctions both those dispositions imposed by the judge at the time of sentencing and administrative programs in the custodial setting which affect the degrees of incarceration to which an inmate is subject.
- 12.14 The Commission recommends that the *Criminal Code* be amended to permit the imposition of a fine alone even for those offences which are punishable by a term of imprisonment of more than five years.
- 12.15 The Commission recommends that fines be available for all offences (except life sentences) regardless of the maximum penalty provided and in spite of the fact that some offences would have presumptive "in" designations. Where the imposition of a fine would constitute a departure from the presumptive disposition, it should be justified with reasons.
- 12.16 The Commission recommends that for those offences for which a judge has decided to impose a community disposition, a pecuniary sanction such as a fine be considered as a first alternative for the more serious offences and for the more serious instances of the lesser offences.
- 12.17 The Commission recommends that a restitution order be imposed when the offence involves loss or damage to an individual victim. A fine should be imposed where a public institution incurs loss as a result of the offence or damage caused to public property.
- 12.18 The Commission recommends that where the offence carries a presumptive "out" disposition, greater use be made of fines where the offender has benefitted financially from the commission of the offence.
- 12.19 The Commission recommends that the permanent sentencing commission should consider ways of assisting the courts in the determination of equitable fines on offenders of varying means so as to maximize equality of impact. The Swedish day-fine system is an

example to be studied. Meanwhile, the provinces should be encouraged to institute pilot projects on the use of day-fine systems.

- 12.20 The Commission recommends that once it has been decided that a fine may be the appropriate sanction, consideration must be given to whether it is appropriate to impose a fine on the individual before the court. The amount of the fine and time for payment must be determined in accordance not only with the gravity of the offence, but also with the financial ability of the offender. Further to the above principle, prior to the imposition of a fine, the court should inquire into the means of the offender to determine his ability to pay and the appropriate mode and conditions of payment.
- 12.21 The Commission recommends that where the limited means of an offender permits the imposition of only one pecuniary order, priority be given to an order of restitution, where appropriate.
- 12.22 The Commission recommends a reduction in the use of imprisonment for fine default.
- 12.23 The Commission recommends that a quasi-automatic prison term not be imposed for fine default and that offenders only be incarcerated for *wilful* breach of a community sanction.
- 12.24 The Commission recommends that section 648 of the *Criminal Code* be retained.
- 12.25 The Commission recommends that the payment of fines be enforced in accordance with the model for fine default described on pages 382-384.
- 12.26 The Commission recommends that the following national conversion table be used for the assessment of default periods where incarceration is imposed for wilful non-payment of a fine:

| <i>For the portion of the sum between:</i> | <i>Per diem rate:</i> | <i>Prison days:</i> |
|--|-----------------------|-----------------------------------|
| \$1 – \$150 | 25 | 6 |
| \$151 – \$300 | 30 | 6 + 5 = 11 |
| \$301 – \$500 | 35 | 11 + 6 = 17 |
| \$501 – \$800 | 40 | 17 + 8 = 25 |
| \$801 – \$1200 | 45 | 25 + 9 = 34 |
| \$1201 – \$2000 | 50 | 34 + 16 = 50 |
| \$2001 – \$4000 | 60 | 50 + 33 = 83 |
| \$4001 – \$7000 | 70 | 83 + 43 = 126 |
| \$7001 – \$10,000 | 80 | 126 + 38 = 164 |
| \$10,001 – \$15,000 | 90 | 164 + 56 = 220 |
| \$15,001 – \$20,000 | 100 | 220 + 50 = 270 |
| \$20,001 – \$25,000 | 110 | 270 + 45 = 315 |
| \$25,001 + | Judge's discretion | 315 + discretion of the judge. |

- 12.27 The Commission recommends that the *Criminal Code* clarify the distinction between compensation and restitution by providing a definition of restitution which is used consistently throughout the *Code*.
- 12.28 The Commission recommends that restitution in the *Criminal Code* be understood to include the return of property obtained by the commission of the offence, the payment of money for the ascertainable loss, damage or destruction of property and/or the payment of money for the ascertainable loss or injury suffered as a result of the commission of the offence, by the offender to the victim.
- 12.29 The Commission recommends that compensation be understood as contribution or payment by the state to the victim of the offence for loss or injury suffered as a result of the commission of the offence.
- 12.30 The Commission recommends that its fine default model also apply to the enforcement of restitution orders.
- 12.31 The Commission recommends that the *Criminal Code* provisions be expanded and permit an order of restitution to be imposed as a separate sanction or in combination with other sanctions.

Prior to the imposition of an order of restitution, the sentencing judge shall inquire, or cause to be conducted, an inquiry into the present or future ability of the offender to make restitution or to pay a fine.

An order of restitution shall include consideration of:

- i) property damages incurred as a result of the crime, based on actual cost of repair (or replacement value);
- ii) medical and hospital costs incurred by the victim as a result of the crime; and
- iii) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime.

As between the enforcement of an order of restitution and other monetary sanctions, priority should be given to restitution.

Chapter 13

- 13.1 The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which

direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

- 13.2 The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.
- 13.3 The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.
- 13.4 The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.
- 13.5 The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.
- 13.6 The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.
- 13.7 The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.
- 13.8 The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.
- 13.9 The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.
- 13.10 The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.
- 13.11 The Commission also recommends that the *Criminal Code* be amended to *expressly* provide that the court is not bound to accept a joint

submission or other position presented by the parties respecting a particular charge or sentence.

- 13.12 The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.
- 13.13 The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada be conducted by the federal and provincial governments or by a permanent sentencing commission.

Chapter 14

- 14.1 The Commission recommends that the *Criminal Code* be amended to provide for the establishment and maintenance of a permanent sentencing commission.
- 14.2 The Commission recommends that the permanent sentencing commission be given the independent authority to collect the data necessary to carry out its mandate. This would include the authority, similar to that given to Statistics Canada, to enlist the co-operation of the provinces.
- 14.3 The Commission recommends that the permanent sentencing commission rely, where necessary in the early years, on special *ad hoc* surveys of sentencing practice.
- 14.4 The Commission recommends that a budget sufficient for collecting the sentencing data necessary to carry out its responsibilities be allocated to the permanent sentencing commission.

List of Statutes

- An Act to Amend the Parole Act and the Penitentiary Act*, S.C. 1986, c. 42.
- British North America Act, (Constitution Act) 1867*, 30 & 31 Vict., c. 3.
- Canada Act 1982*, (U.K.) c. 11 (Sched. B).
- Canadian Bill of Rights*, 8-9 Elizabeth II, c. 44.
- Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act 1982*, (as enacted by the *Canada Act, 1982*, (U.K.) c. 11 (Sched. B)).
- Combines Investigation Act*, R.S.C. 1970, c. C-23.
- Constitution Act, 1982* (enacted by the *Canada Act, 1982* (U.K.) c. 11. (Sched. B)).
- Criminal Code, 1892*, 55-56 Vict., c. 29.
- Criminal Code*, S.C. 1919, c. 46.
- Criminal Code*, S.C. 1921, c. 25.
- Criminal Code, 1927*, R.S.C. 1927, c. 36.
- Criminal Code*, S.C. 1953-54, c. 51.
- Criminal Code*, S.C. 1968-69, c. 38.
- Criminal Code*, R.S.C. 1970, c. C-34.
- Criminal Code*, S.C. 1972, c. 13.
- Criminal Law Amendment Act, 1985* (Bill C-18), 33-34 Elizabeth II, c. 19.
- Department of the Attorney General Act*, R.S.A. 1980, c. D-13.
- Department of Justice Act*, R.S. Nfld. 1970, c. 85.
- Food and Drugs Act*, R.S.C. 1970, c. F-27.
- Government Organization Act*, S.C. 1970, c. 14.

Interpretation Act, R.S.C. 1970, c. I-23.

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Parole Act 1958, 7 Elizabeth II, c. 38.

Penitentiary Act, 1868, 31 Victoria, c. 74.

Prisons and Reformatories Amendment Act, S.C. 1913, c.39.

Provincial Offences Act, R.S.O. 1980, c. 400.

Summary Convictions Act, R.S.B.C. 1974, c. 73.

Ticket-of-Leave Act, 1899, (An Act to provide for the Conditional Liberation of Penitentiary Convicts) 62-63 Victoria, c. 49.

Young Offenders Act, S.C. 1980-81-82-83, c. 110.

Proposed Legislation

Criminal Law Reform Act, 1984 (Bill C-19). Second Session, Thirty-second Parliament, 32-33 Elizabeth II, 1983-1984. (The Bill received first reading February 7, 1984, and subsequently died on the order paper.)

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- Adgey* (1973), 23 C.R.N.S. 298 (S.C.C.)
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- A.G. of Canada v. C.N. Transportation Ltd. et al.; A.G. of Canada v. C.P. Transport Co. Ltd. et al. and A.G. of Ontario et al.* (1983), 7 C.C.C. (3d) 449 (S.C.C.)
- A.G. of Québec v. Rubio* (1984), 39 C.R. (3d) 67 (Que. S.C.).
- Alderton* (1985), 44 C.R. (3d) 254 (Ont. C.A.)
- Antone and Antone* (1977), 20 Crim. L.Q. 143 (Ont. C.A.).
- Aramah* (1983), Crim. L. R. 27
- Aziz* (1981), 57 C.C.C. (2d) 97 (S.C.C.)
- Babiak* (1975), 21 C.C.C. (2d) 464 (Man. C.A.)
- Baker* (1977), 17 N.S.R. (2d) 239 (N.S.S.C.)
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- Baldwin and Bauer and The Queen, Re* (1980), 54 C.C.C. (2d) 85 (Ont. H.C.J.)
- Basha* (1978), 23 Nfld. & P.E.I.R. 310 (Prov. Ct.)
- Basha et al.* (1979), 23 Nfld. & P.E.I.R. 286 (Nfld. C.A.)
- Beauregard* (1983), 38 A.R. 350 (Alta. C.A.)
- Beckner* (1984), 15 C.C.C. (3d) 244 (Ont. C.A.).
- Begum Bibi* (1980), 71 Cr. App. 360

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